TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 185.

McCABE AND STERN CONSTRUCTION COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM S. WILSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED SEPTEMBER 24, 1917.

(29,000)

(20,460.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 155.

McCABE AND STEEN CONSTRUCTION COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM N. WILSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a No. 1640.

McCabe & Steen Construction Company, Plaintiff in Error,
vs.
William N. Wilson, Defendant in Error.

Appeal from the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States.

b United States of America to William N. Wilson, defendant in error, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, thirty days from and after the day this citation bears date, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of Oklahoma Territory, wherein McCabe & Steen Construction Co., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said McCabe & Steen Construction Co., a corporation, plaintiff in error as in said Writ of Error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jno. H. Burford Chief Justice of the Supreme Court of Oklahoma Territory, this Sixth day of October, A. D. 1906.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Service of copy of above acknowledged this October 8th 1906.
SHARTEL, KEATON & WELLS,
Att'ys for Def't in Error.

c [Endorsed:] No. 1640. McCabe & Steen Construction Company, Plaintiff in error, *vs.* Wm. N. Wilson, Defendant in error. Citation and service thereof. Filed Oct. 8 1906. Benj. F. Hegler, Clerk Supreme Court.

1 In the Supreme Court of Oklahoma Territory.

No. 1640.

McCabe & Steen Construction Company (a Corporation), Plaintiff in Error,
vs.
W. N. Wilson, Defendant in Error.

McCabe & Steen Construction Company, a corporation, Plaintiff in Error in the above entitled Cause, feeling itself aggrieved by the verdict of the jury and judgment entered in the District Court of the Third Judicial District of the Territory of Oklahoma, sitting in and for the County of Oklahoma, at Oklahoma City in said County, on the 30th. day of October, 1903, for the sum of $5,500.00 and costs

of suit, and by the judgment of the Supreme Court of the Territory of Oklahoma, affirming said judgment of said trial court, entered on the 6th. day of September A. D., 1906; comes now by Arthur G. Mosley and Louis B. Eppstein, its attorneys and represents; that the matter in controversy in said suit exceeds the sum of Five Thousand Dollars besides costs, and that the jurisdiction of none of the Court above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of the different states and that this cause does not arise under the patent laws nor the revenue laws nor the criminal laws and that it is not an Admiralty case and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause, directing the Clerk of the Supreme Court of Oklahoma Territory to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of may be reviewed and if error be found, corrected, according to the laws and customs of the United
2 States, and also that an order be made fixing the amount of security which the plaintiff in error, shall give and furnish, upon said writ of error and that upon the giving of such security, all further proceedings in said Supreme Court of the Territory of Oklahoma and in said District Court of the Third Judicial District of the Territory of Oklahoma, sitting in and for the County of Oklahoma, be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner, will ever pray.

McCABE & STEEN CONSTRUCTION COMPANY,
Plaintiff in Error,
By ARTHUR G. MOSLEY &
LOUIS B. EPPSTEIN,
Its Attorneys.

Filed Oct. 8, 1906.
BENJ. F. HEGLER,
Clerk Supreme Court.

The foregoing petition is granted and writ of error allowed as prayed for, and supersedeas allowed and ordered to be issued upon plaintiff in error giving supersedeas bond according to law in the sum of Twelve Thousand Dollars ($12,000.00).

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

[SEAL.]
Attest:
BENJ. F. HEGLER,
Clerk Supreme Court.

Filed Oct. 8, 1906.
BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed on the back as follows: No. 1640. In the Supreme Court of the Territory of Oklahoma. McCabe & Steen Construction Co., (a corporation) Plaintiff in Error *vs.* W. N. Wilson, Defendant in Error. Petition for Writ of Error and Supersedeas. Filed Oct. 8, 1906, Benj. F. Hegler, Clerk Supreme Court. Mosley & Eppstein, attorneys for plaintiff in error.

3 In the Supreme Court of Oklahoma Territory.

No. 1640.

McCabe & Steen Construction Company (a Corporation), Plaintiff in Error,

vs.

W. N. Wilson, Defendant in Error.

Assignment of Errors.

Comes now the Plaintiff in Error, by its attorneys, and says that the trial court and the Supreme Court of the Territory of Oklahoma committed certain errors upon the trial of the above entitled and numbered case to the disadvantage of the Plaintiff in Error, the specification whereof is as follows, viz.:

1st Assignment of Error.

The court erred in over-ruling Plaintiff in Error's motion and renewed motion to exclude the testimony of witness Tuck Waters to the effect that the man Pratt was a Superintendent of Construction of Plaintiff in Error, it having appeared from the testimony of said Waters that the statement so made by him was hearsay.

2nd Assignment of Error.

The court erred in permitting the witness Tuck Waters to testify over the objection of Plaintiff in Error that before going upon the bridge which is alleged to have fallen he told the Defendant in Error Wilson that Pratt and Fallahay had stated to him that the bridge was safe.

3rd Assignment of Error.

4 The court erred in permitting the Defendant in Error over the objection of Plaintiff in Error to testify to the conversation between himself and Engineer Tuck Waters to the effect that Pratt and Fallahay had told the Engineer, Tuck Waters, that the bridge was safe.

4th Assignment of Error.

The court erred in permitting the Defendant in Error Wilson, over the objection of Plaintiff in Error, to testify that he would not have gone upon the bridge but for the statement repeated to him by Tuck Waters or Pratt and Fallahay that the bridge was safe.

5th Assignment of Error.

The court erred in over-ruling the demurrer offered by Plaintiff in Error to the evidence produced by Defendant in Error upon the questions of the testimony offered by Defendant in Error—Plaintiff below.

6th Assignment of Error.

The court erred in sustaining the objection made by Defendant in Error to the testimony of V. E. Steen offered by the Plaintiff in Error to the effect that the Defendant in Error Wilson was not in the employment of the Plaintiff in Error at the time that he was injured, and that the Plaintiff in Error, a corporation, was not in existence at that time.

7th Assignment of Error.

The court erred in sustaining the objection offered by Defendant in Error to the testimony of the witness V. E. Steen, offered by the Plaintiff in Error, to the effect that the said Pratt and Fallahay were not at the time of the accident in the employment of the Plaintiff in Error and were not at that time servants of the Plaintiff in Error.

5 8th Assignment of Error.

The Court erred in sustaining the objection offered by the Defendant in Error to the testimony of the witness V. E. Steen, offered by the Plaintiff in Error, to the effect that at the time Defendant in Error received the injury complained of on, to-wit, the 9th day of June, 1902, the Plaintiff in Error had no contract for building a railroad from Oklahoma City to Quanah, Texas, and was not then engaged in the work of constructing the same, and that it had no contract for the building of the bridge which was alleged to have fallen, and was not then engaged in the work of constructing or repairing the same.

9th Assignment of Error.

The court erred in refusing to allow the application of the Plaintiff in Error to amend its answer filed in the cause in order that the testimony which was excluded by the court, as shown by Assignments of Error 6, 7 and 8, could be introduced. That is to say, the court having ruled that under the pleading Plaintiff in Error was not entitled to show that the Defendant in Error Wilson was not at the time of the accident in the employment of the Plaintiff in Error, and that the said Pratt and Fallahay were not at the time of the accident in the employment of the Plaintiff in Error or its servants, and that at the time of the accident the Plaintiff in Error had no contract for the construction of said road or bridge and was not then engaged in the construction thereof, the Plaintiff in Error made application to the court for leave to amend its answer so that testimony tending to prove said facts could be introduced thereunder, which

application was refused by the court, and said action of the court is now here assigned as error.

6 10th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

To bring in a verdict in favor of the defendant.

11th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

The undisputed evidence shows that after plaintiff arrived at the bridge he saw that the water was high and he also saw a bent in the bridge sink which he assisted in repairing. That just before the engine and train were started on to the bridge the engineer, Waters, told plaintiff that he could get off of the engine and get on the caboose when it pulled up and thereby escape risk. That plaintiff had time and opportunity for choice.

It does not appear that taking advantage of the offer would have prejudiced plaintiff in any way. That plaintiff did not avail himself of the offer which would have saved him from harm but stayed in the engine and was injured. This will prevent plaintiff from recovering and you will so find for it does not matter whether plaintiff was influenced to remain on the engine, when a safer place was offered to him either by the tests of the bridge which he had witnessed as by the assurances of Pratt and Fallahay reported to him by Waters that the bridge was safe, for in the former instance he will be held to have assumed the risk and in the latter instance his conduct would be attributable to the act of fellow servants and in neither case would the master be liable.

12th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

7 You are instructed that if the defendant, in repairing this bridge, performed the work in the usual and customary manner in which work of this character, under similar circumstances is constructed, and used that degree of care, in the erection and construction of such structures, that a person of ordinary prudence would have used under like circumstances, then the defendant would be guilty of no negligence in the construction of such bridge, and in such case you will find for defendant.

13th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

The jury are instructed that if they believe from the evidence that plans were furnished by the Ry. Co. for the construction and repair of the bridge and that the same was constructed and repaired in ac-

cordance with such plans under the direction of a competent engineer furnished by the Railway Company and was in such completed state when plaintiff crossed it in the engine and that the falling of the bridge was occasioned by high water that rose the night before the accident and that defendant had no knowledge or notice of the existence of such danger you will find for defendant.

14th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

The jury are instructed that negligence is never presumed but must be proven. That in order for plaintiff to recover you must find the defendant guilty of some act of negligence complained of in plaintiff's petition. That the fact standing alone of the sinking or falling of the bridge will not of itself be sufficient to justify you in finding the defendant guilty of negligence.

8

15th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

You are instructed that the fact that the bridge in this case went down, and that the accident complained of by plaintiff occurred, is not of itself evidence of any negligence on the part of the defendant, and that the burden of proof remains upon plaintiff to establish by a preponderance of testimony, by which is meant the greater weight of credible testimony, that the defendant was guilty of the negligence charged in said petition. The burden is on the plaintiff to show the particular act or acts of negligence on the part of defendant that approximately caused the injury complained of, so even if you should believe that defendant may have been guilty of some act of negligence yet if you believe that the act of any other person intervened between the such act of defendant and plaintiff's accident and that the act of such other person was the immediate and proximate cause of plaintiff's injuries you will find for defendant. In this connection you are charged that the conversations and statements alleged to have been had at the bridge between Fallahay and Pratt and the trainmen cannot be imputed to defendant.

16th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

You are instructed that even if you believe from the evidence that defendant was guilty of negligence toward the plaintiff, in any of the matters submitted to you in the charge of the court, and that such negligence contributed to the injuries in question in
9 this suit. Still, if you further find from the evidence that the plaintiff, in remaining in his cab and going upon the bridge under the circumstances of this case, did not exercise that degree of care that an ordinarily prudent person would have exercised under similar circumstances, in that event, plaintiff cannot recover

in this suit, and in this connection, you are further charged that if engineer in charge of the engine on which plaintiff attempted to cross said bridge, suggested to plaintiff another and safer plan for plaintiff to adopt in crossing said bridge and gave plaintiff the option of leaving the cab and catching the end of the train; and if the jury further believe that the adoption by this plaintiff of this plan would have prevented the accident which occurred to plaintiff in this case; and if the jury further believe from the evidence that the plaintiff, after receiving such option to alight from said cab and wait until the engine had passed over said bridge in safety before attempting to go over, elected to remain on said cab and cross said bridge in the manner in which he did; and if the jury further believe that in so doing the plaintiff did not act as a reasonably prudent person would have done under similar circumstances, then you are instructed that the plaintiff cannot recover in this cause.

17th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

You are instructed that an employee is guilty of contributory negligence, which will defect his right to recover for injuries sustained in the course of his employment where such injuries substantially result from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them. Therefore, if you believe from the evidence that the danger to plaintiff from crossing this bridge was so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them, then and in that event you will find for the defendant.

18th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

You are instructed that plaintiff in entering into a contract of employment as fireman upon construction work, impliedly contracted that he was familiar with the duties of such position and understood the ordinary dangers thereof. Therefore, you are charged that if you believe from the evidence that accidents such as occurred to plaintiff are such as ordinarily are likely to occur in work of this character, then you are charged that plaintiff cannot recover in this case.

19th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

You are instructed that construction companies are not required to use extraordinary tests for the purpose of discovering defects that threathen the safety and security of bridges which they are constructing, which are not practicable and customary, but that they do fulfill their duty, if they adopt such tests for this purpose as are ordinarily

used by reasonably prudent construction companies, under like circumstances, engaged in work of like character; and in this connection, you are charged that if the defendant adopted such tests
11 for the purpose of discovering whether or not this bridge was safe, that an ordinarily prudent construction company, under similar circumstances, would have adopted for the same purpose, and if such tests would have satisfied any reasonably prodent construction company that the same was safe for the purpose for which they expected to use it, then you will find for the defendant.

20th Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

The jury are instructed that if they believe from the evidence that the bridge was safe and secure on Sunday and that the falling in was occasioned by high water that rose Sunday night and that the defendant had no notice or knowledge of the rise in the river, you will find for defendant and in this connection you are instructed that notice to Fallahay or Pratt would not constitute notice to the defendant.

21st Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

The jury are instructed that if they believe that the bracing and supports of the bridge were reasonably sufficient and were placed in the usual and customary manner and that the falling of the bridge was caused by washing away of the dirt between or around the supports, then you will find for the defendant.

22nd Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

The jury are instructed that the uncontradicted evidence having shown that the defendant company did not originally build
12 and did not make the repairs upon the bridge in question, you cannot hold it responsible for any faults in construction.

Therefore if you believe from the evidence that the proximate cause of plaintiff's injury was faulty construction of the bridge you will find for defendant.

23rd Assignment of Error.

The court erred in refusing to give to the jury an instruction requested by Plaintiff in Error as follows, viz.:

If you believe from the evidence that defendant had issued an order to the trainmen to stop at the bridge and see that everything was safe before crossing, and if you further believe that said bridge was constructed in a reasonably safe manner and with reasonably safe materials and that the proximate cause of the bridge giving way

was the effect of high water which had risen the night before the accident and was still up at the time plaintiff arrived at the bridge, and if you further believe that plaintiff relied upon the report of the engineer Waters and of Fallahay and Pratt as to the condition of the bridge, and that defendant was not present and did not advise plaintiff to cross the bridge, you are charged that plaintiff will be held at law to have assumed the risk of crossing the bridge and cannot recover for injury sustained thereby.

24th Assignment of Error.

The court erred in giving to the jury the instruction contained in Paragraph 2 of the charge, which is as follows, viz.:

In this case you are instructed that it was the duty of the defendant to use all reasonable care and precaution to see that the bridge
13 where the injury occurred, if you find that the defendant was injured, was in a safe condition, but if you find that the bridge was constructed in a manner approved and considered sufficient by those skilled in bridge building and that the defendant used all reasonable precautions to prevent an accident and that the falling of the bridge could not reasonably have been anticipated when taking into consideration all of the facts within the defendant's knowledge, then and in that event the plaintiff cannot recover, but if taking all of the facts and circumstances as described by the evidence, into consideration, the defendant could reasonably have anticipated that the bridge was unsafe, then and in that event it was the duty of the defendant to see to it that the bridge was put in a safe condition and that it was sufficiently strong to carry trains safely over same, and if the defendant with such information and knowledge of the defective condition of the bridge or with knowledge of such facts and circumstances as would cause persons acquainted with the nature and character of bridge structures similar to the one in question, to apprehend that it was as unsafe and dangerous, without taking steps to ascertain as to whether it was safe or unsafe, caused the plaintiff to cross such bridge with his train and the bridge fell and by reason thereof the plaintiff was injured, then he is entitled to recover, unless you further find that he himself was guilty of contributory negligence.

25th Assignment of Error.

The court erred in giving to the jury the instruction contained in Paragraph 3 of the charge, which is as follows, viz.:

When one accepts employment he assumes all of the ordinary risks incident to such employment and while one engaged in running a work train or a train to carry supplies over a new line being
14 built and on which is placed what is known as false or temporary bridges cannot in law demand that the employer build such temporary bridges so that there cannot be possibility of an accident; still where the employé is not engaged in the construction of such road or bridge but is engaged solely in working on such train as fireman, he has a legal right to rely upon the safety of the bridge and if he suffer injury by the bridge falling he may recover unless

the employer used all reasonable precaution to make the bridge safe and had reasonable grounds to believe that it was safe at the time, or the employé was guilty of contributory negligence. In other words, the employé accepted the employment with knowledge of the increased danger of running a train over false work or temporary bridges and he assumed all of the ordinary risks incident thereto; but if the danger was increased by the neglect of the defendant either to use proper care, after it found that it was weak, or to put it in repair after such time, or to ascertain the condition thereof or to take such due and proper precautionary measures as would be adopted by an ordinary, prudent person engaged in such work, to prevent accident to employés, as the exigencies of the situation might require, he did not assume such additional risk unless you find that the plaintiff ought, under all of the circumstances, to have known that the bridge was dangerous; and in determining as to whether the plaintiff ought to have known that the bridge was dangerous you are instructed that the plaintiff was not chargeable with the technical knowledge of an expert in bridge building, but only with such knowledge as is possessed by one engaged in plaintiff's occupation at the time, taking into consideration the plaintiff's knowledge, ex-
15 perience and education. If the defects were such as the plaintiff, situated as he was ought to have known and that notwithstanding such fact he crossed the bridge, then he cannot recover, but if the defects in the bridge were hidden and were such as would require one skilled in bridge work to discover and that the plaintiff did not in fact know that the bridge was unsafe, then the plaintiff was not chargeable with knowledge of such defect.

26th Assignment of Error.

The court erred in giving to the jury the instruction contained in Paragraph 4 of the charge, which is as follows, viz.:

You are instructed that if the defendant, in repairing this bridge, performed the work in the usual and customary manner in which work of this character, under similar circumstances, is constructed, and used that degree of care in the erection and construction of such structure that a person of ordinary prudence engaged in such work would have used under like circumstances, then the defendant would be guilty of no negligence in the construction and repair of such bridge, and in such case you will find for defendant, unless you further find that after a portion of the bridge was taken out and such repairs made the defendant, in the light of all of the facts within its knowledge, ought to have known that at the time of the alleged injury the bridge was unsafe, or was in possession of such knowledge, facts and circumstances as would have caused an ordinarily prudent person engaged in such business to investigate, and if investigation had been made it would have led to a knowledge that the bridge was unsafe.

27th Assignment of Error.

16 The court erred in giving to the jury the instruction contained in Paragraph 5 of the charge, which is as follows, viz.:

The jury are instructed that if they believe from the evidence that plans were formulated by the Ry. Co. for the construction and repair of the bridge and that the same was constructed and repaired in accordance with such plans under the direction of a competent engineer furnished by the railway company and was in such completed state when plaintiff crossed it in the engine and that the falling of the bridge was occasioned by high water that rose the night before the accident and that defendant had no knowledge or notice of the existence of such danger, you will find for defendant, unless you further find that after the erection of such bridge the defendant was in possession of facts which would arouse the suspicions of the defendant and cause them to doubt the sufficiency of the bridge, in which event if thereafter it failed to investigate and repair the bridge and make it safe, if the defects could reasonably have been ascertained, then the defendants would be guilty of negligence.

28th Assignment of Error.

The court erred in giving to the jury the instruction contained in Paragraph 8 of the charge, which is as follows, viz.:

You are also instructed that construction companies are not required to use extraordinary tests for the purpose of discovering defects that threaten the safety and security of bridges which they are constructing, which are not practicable and customary, but that they fulfill their duty if they adopt such tests for this purpose as are ordinarily used by reasonably prudent construction companies, under like circumstances, engaged in work of like character; and in this connection, you are charged that if the defendant adopted
17 such tests for the purpose of discovering whether or not this bridge was safe, that an ordinarily prudent construction company, under similar circumstances would have adopted for the same purpose, and if such tests would have satisfied any reasonably prudent construction company that the same was safe for the purpose for which they expected to use it, then you will find for the defendant, but on the other hand the mere fact that the bridge may have stood the test usually adopted would not excuse the defendant if it was at the time in possession of other facts and circumstances which would cause an ordinarily prudent person familiar with such work, to have a well grounded apprehension of danger and such as would cause such an one to investigate and that an investigation would have discovered the defects and avoided the injury.

29th Assignment of Error.

The court erred in giving to the jury the instruction contained in Paragraph 9 of the charge, which is as follows, viz.:

The jury are instructed that if they believe that the bracing and supports of the bridge were reasonably sufficient, and were placed in the usual and customary manner and that the falling of the bridge was caused by washing away of the dirt between or around the supports, and that such fact would not have been discovered by the defendant by the exercise of ordinary care, then you will find for

the defendant; but it is for you to say under all the evidence as t what was the cause of the bridge falling and as to whether the sam would have been averted by the exercise of ordinary care on th part of the defendant.

30th Assignment of Error.

The court erred in giving to the jury the instruction con
18 tained in Paragraph 10 of the charge, which is as follows viz.:

The jury are instructed that the uncontradicted evidenc having shown that the defendant company did not originally build and did not make the repairs upon the bridge in question, you can not hold it responsible for any faults in construction. Therefor if you believe from the evidence that the proximate cause of plaintiff's injury was faulty construction of the bridge you will find for defendant unless you further find that defendant knew the construction of said bridge in which event it would be chargeable the same as though it had caused it to be built.

And in this connection you are further instructed that the defendant is estopped from claiming that it was not operating the train in question or that Fallahay or Pratt or plaintiff was not in its employ or that it was not in existence at the time of the alleged injury.

31st Assignment of Error.

The court erred in giving to the jury the instruction contained in Paragraph 11 of the charge, which is as follows, viz.:

If you find that defendant had issued an order to all train men to stop at the bridge and see that everything was safe before crossing, this order would not require each person on the train to get off of the train and make a personal inspection of the bridge. If the general superintendent of the defendant was present and advised the train crew that the bridge was safe and signaled the train men to cross over, the order in question was sufficiently complied with.

19 32nd Assignment of Error.

The court erred in submitting said cause to the jury and in not entering judgment for Plaintiff in Error because there was no evidence of negligence on the part of Plaintiff in Error.

33rd Assignment of Error.

The court erred in submitting said cause to the jury and in not entering judgment for Plaintiff in Error because the uncontradicted testimony showed that Defendant in Error could have avoided the injury by the exercise of ordinary care and prudence.

34th Assignment of Error.

The court erred in submitting said cause to the jury and in not entering judgment for Plaintiff in Error because the uncontradicted testimony showed that Defendant in Error voluntarily and needlessly

subjected himself to the risk from which the injury resulted, with full knowledge of its existence.

35th Assignment of Error.

The court erred in submitting said cause to the jury and in not entering judgment for Plaintiff in Error because the undisputed testimony showed that the employer of Defendant in Error had posted placards, which had been brought to the attention of Defendant in Error, instructing all employees on trains before passing over the bridge across the Canadian River to stop and see that everything was safe before crossing.

36th Assignment of Error.

The court erred in submitting said cause to the jury and in not entering judgment for Plaintiff in Error because the undisputed evidence showed that Defendant in Error was engaged in the construction of the road bed and bridge in question and was a fellow servant with Pratt, Fallahay and Tuck Waters.

20 37th Assignment of Error.

The court erred in submitting said cause to the jury and in not entering judgment for Plaintiff in Error because the uncontradicted testimony showed that Plaintiff in Error was not in existence at the time of the happening of the events described in the petition and was not the employer of Defendant in Error and was not engaged in the construction of the road bed or bridge in question.

38th Assignment of Error.

The trial court erred in over-ruling the motion presented therein for a new trial of said cause.

39th Assignment of Error.

The Supreme Court erred in affirming the judgment of the trial court and in ordering the same to be executed.

40th Assignment of Error.

The Supreme Court erred in holding that the exception saved to the act of the court in reference to giving any of the separate instructions requested by Plaintiff in Error was insufficient.

41st Assignment of Error.

The Supreme Court erred in holding that the general denial was not sufficient to put in issue the capacity under which Pratt and Fallahay were in the service of Plaintiff in Error.

42nd Assignment of Error.

The Supreme Court erred in holding that the general denial was not sufficient to put in issue the fact of the employment of a servant by Plaintiff in Error and the capacity under which he was employed.

21

43rd Assignment of Error.

The Supreme Court erred in holding that the general denial was not sufficient to put the burden of proof upon the Defendant in Error to show that the Plaintiff in Error was responsible for the injuries received by the Defendant in Error.

44th Assignment of Error.

The Supreme Court erred in holding that the general denial was not sufficient to put in issue the question as to whether or not Plaintiff in Error was a master or employer of Defendant in Error at the time of the happening of the events complained of.

45th Assignment of Error.

The Supreme Court erred in holding that the general denial was not sufficient to put in issue the question as to whether or not the Plaintiff in Error was a master or employer of Pratt and Fallahay at the time of the happening of the events complained of.

46th Assignment of Error.

The Supreme Court erred in holding that the general denial was not sufficient to put in issue the question as to whether or not the Plaintiff in Error was engaged in the construction of the road or bridge in question and in the operation of the construction train upon which Defendant in Error was a fireman.

47th Assignment in Error.

The Supreme Court erred in holding that the rule of law with reference to the master's responsibility to furnish a safe place for the servant to work applies alike to a construction company engaged in the construction of a road bed and erection of bridges and to a
22 railroad company with completed road bed and bridges engaged in the operation of trains for traffic.

48th Assignment of Error.

The Supreme Court erred in holding that Pratt and Fallahay represented the Plaintiff in Error.

49th Assignment of Error.

The Supreme Court erred in holding that Pratt and Fallahay were not fellow servants of Defendant in Error.

50th Assignment of Error.

The Supreme Court erred in refusing to consider the objections made by Plaintiff in Error to the testimony offered by Defendant in Error, duly excepted to upon the trial and now here referred to in Assignments —, — and —.

51st Assignment of Error.

The Supreme Court erred in refusing to consider certain rulings of the trial court whereby evidence offered by Plaintiff in Error was rejected, to which exception was taken at the time and which matters are here now presented in Assignments —, — and —.

52nd Assignment of Error.

The Supreme Court erred in holding that the posting of bulletins directing all train employees to examine for themselves the bridge over the Canadian River before going over the same did not change the contract of employment between the master and servant and relieve the master of the implied assurance that the bridge was safe.

53rd Assignment of Error.

The Supreme Court erred in holding that the evidence did
23 not conclusively show that the Defendant in Error assumed all risk incident upon crossing the bridge and therefore could not recover.

54th Assignment of Error.

The Supreme Court erred in holding that the uncontradicted evidence failed to show that by the use of ordinary care for his own safety the Defendant in Error would have avoided injury.

55th Assignment of Error.

The Supreme Court erred in holding that the uncontradicted evidence failed to show that the Defendant in Error voluntarily and needlessly subjected himself to the danger from which the injury resulted.

56th Assignment of Error.

The Supreme Court erred in holding that there was any evidence of negligence on the part of Plaintiff in Error.

Wherefore the Plaintiff in Error prays that the said judgment of the Supreme Court of the Territory of Oklahoma and of the District Court for the Third Judicial District of the Territory of Oklahoma, sitting in and for the County of Oklahoma, may be reversed and vacated and that this cause be remanded to the said trial court for such proceedings therein as may be in accordance with the opinion of this Honorable Court.

Respectfully submitted,

ARTHUR G. MOSELEY,
LOUIS B. EPPSTEIN,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 1640. In the Supreme Court of Oklahoma Territory. McCabe & Steen Construction Co., (a corporation), plaintiff in error, *vs.* W. N. Wilson, defendant in error. Assignment of Errors. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court. Moseley & Eppstein, attorneys for plaintiff in error.

24 In the Supreme Court of the Territory of Oklahoma.

McCabe & Steen Construction Company, a Corporation, Plaintiff in Error,
vs.
W. N. Wilson, Defendant in Error.

Affidavit.

Before the undersigned Clerk of the Supreme Court of the Territory of Oklahoma personally appeared W. C. Reeves, who being duly sworn by me upon his oath says that he is one of the attorneys and agent for the above named plaintiff in error, and that the amount in controversy in the above entitled cause exclusive of costs exceeds five thousand dollars.

W. C. REEVES.

Subscribed and sworn to before me this 8th day of October, 1906.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed on the back as follows: No. 1640. McCabe & Steen Construction Company, *vs.* W. N. Wilson, Affidavit as to amount in controversy. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court.

25 United States of America, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the September Term, 1906, thereof between McCabe & Steen Construction Co., a corporation, plaintiff in error, and William N. Wilson, defendant in error, a manifest error hath happened, to the great damage of the said McCabe & Steen Construction Co., plaintiff in error, as by this complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, District of Columbia, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, District of Columbia, and filed in the Office of the Supreme Court of the United States, on or before the 5th day of November, 1906, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to

correct that error, what of right, and according to the laws and customs of the United States, should be done.

26 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this Sixth day of October, in the year of our Lord one thousand nine hundred and six.

Issued at office in Guthrie, Oklahoma Territory, with the seal of the Supreme Court of the Territory of Oklahoma, and dated as aforesaid.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed by
JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] Number 1640. McCabe & Steen Construction Company, plaintiff in error, *vs.* Wm. N. Wilson, defendant in error. Writ of Error. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

In obedience to the command to the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause.

In Witness Whereof, I hereto subscribe my name and affix the seal of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

27 In the Supreme Court of the Oklahoma Territory, Guthrie, O. T.

No. 1640.

McCABE & STEEN CONSTRUCTION COMPANY (a Corporation), Plaintiff in Error,
vs.
W. N. WILSON, Defendant in Error.

Know all men by these presents that we, McCabe and Steen Construction Company, as principal, and C. G. Jones, as surety, are held and firmly bound unto W. N. Wilson, defendant in error above named, in the sum of Twelve Thousand Dollars, to be paid to the said W. N. Wilson, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals, and dated the 15" day of September, 1906.

Whereas, the above named plaintiff in error, McCabe and Steen Construction Company, has sued out a writ of error to the Supreme Court of the United States, at Washington, D. C., to reverse a judgment rendered by the Supreme Court of Oklahoma Territory, on the sixth day of September, 1906, in cause numbered upon the docket of said court sixteen hundred forty, (No. 1640), wherein the above named McCabe and Steen Construction Company was plaintiff in error, and wherein the above named W. N. Wilson was defendant in error.

Now, therefore, the condition of this obligation is such that if the above named McCabe and Steen Construction Company, plaintiff in Error, shall prosecute said writ to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

28 McCABE & STEEN CONSTRUCTION COMPANY,
Plaintiff in Error.

Per A. G. MOSLEY,
Attorney of Record.

C. G. JONES, *Surety.*

OKLAHOMA TERRITORY, *Oklahoma County:*

Before me, the undersigned authority, on this day personally appeared C. G. Jones, who having been by me first duly sworn, deposes and says: That he is the identical person whose name is signed as surety to the above and foregoing bond for writ of error in the case of McCabe and Steen Construction Company, plaintiff in error, *versus* W. N. Wilson, defendant in error, wherein writ has been sued out in the Supreme Court of the United States to the Supreme Court of Oklahoma Territory, and said affiant further says: That he is well and truly worth the sum of twelve thousand dollars over and above all liabilities and indebtedness.

C. G. JONES.

Subscribed and sworn to before me the 15" day of September, 1906.

JOS. J. NOVAK,
[SEAL.] *Notary Public, Oklahoma County, Oklahoma Territory.*

My commission expires June 22, 1909.

Endorsed on the back as follows: No. 1640. McCabe & Steen Construction Co., Plaintiff in Error, *vs.* W. N. Wilson, Defendant in Error. Supersedeas Bond. Approved this sixth day of October, 1906. Jno. H. Burford, Judge. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court. Arthur G. Mosley, Att'y for Plaintiff in Error.

29 In the Supreme — of Oklahoma Territory.

No. 1640.

McCABE & STEEN CONSTRUCTION COMPANY, a Corporation, Plaintiff in Error,

vs.

WILLIAM N. WILSON, Defendant in Error.

Petition in Error.

The said McCabe & Steen Construction Company, plaintiff in error, complains of the said William N. Wilson, defendant in error, for that the said William N. Wilson, defendant in error, at the October Term, 1903 of the District Court of Oklahoma County, Oklahoma Territory recovered a judgment by the consideration of said Court against the said McCabe & Steen Construction Company, in a certain action then pending in the said Court wherein the said William N. Wilson was plaintiff and the said McCabe & Steen Construction Company was Defendant, the number of said case being upon the docket of said Court 3548. An original case made duly certified is hereto attached, marked Exhibit A, and made a part of this petition in error, and the said McCabe & Steen Construction Company avers that there is error in the said records and proceedings in this, to wit:

The Court erred in overruling the motion of plaintiff in error for a new trial.

Wherefore, the plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught and that said cause may be reversed and remanded to said trial court for a new trial therein, and that the plaintiff in error be restored to all rights it has lost by the rendition of said judgment and for such further relief as to the Court may seem just.

McCABE & STEEN CONSTRUCTION COMPANY,
A Corporation, Plaintiff in Error,
By A. G. MOSLEY, *Its Attorney.*

30 Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Defendant in error hereby enters his appearance in the above entitled court and cause and waives the issuance and service of summons in error on him herein.

SHARTEL, KEATON & WELLS,
Attorneys for Defendant in Error.

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

31 EXHIBIT A.

In the District Court of the Third Judicial District of Oklahoma, Sitting in and for the County of Oklahoma.

No. 3548.

WILLIAM N. WILSON, Plaintiff,
vs.
McCABE & STEEN CONSTRUCTION COMPANY, a Corporation, Defendant.

Case-made.

Be it remembered that on, to wit, the 18th day of October, 1902, there was filed in the office of the Clerk of the District Court, of the Third Judicial District of the Territory of Oklahoma, sitting in and for the County of Oklahoma, at Oklahoma City, in said County, by the above named plaintiff, William N. Wilson, a petition against the defendant, McCabe & Steen Construction Company, a corporation, which was in words and figures as follows, to wit:

32 TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

In the District Court.

WILLIAM N. WILSON, Plaintiff,
vs.
McCABE & STEEN CONSTRUCTION COMPANY, a Corporation, Defendant.

Petition.

Comes now, William N. Wilson, plaintiff above named and for his cause of action against said above named defendant alleges,

First. That said defendant is a corporation duly and legally organized under the laws of the State of Missouri and having an office and place of business in said Oklahoma County and Territory of Oklahoma, said defendant at all the times hereinafter stated being engaged as sub-contractor in constructing a portion of the Oklahoma City and Western Railroad, said road extending from the City of Oklahoma City to Quanah, Texas.

Second. That on or about the — day of April, 1902, plaintiff was employed by said defendant through one J. Pratt, the General Superintendent of Construction of defendant, as locomotive fireman on one of Defendant's engines used by it in hauling cars containing material for the building of the portion of said railroad, for the construction of which said defendant had such sub-contract.

Third. Plaintiff further alleges that on the 9th day of June, 1902, while so engeged as locomotive fireman for said defendant, he was,

through the negligence and fault of said defendant, seriously and permanently injured as hereinafter described, and in the following manner to wit:

33 That on the morning of said 9th day of June, 1902, he left the said City of Oklahoma City on said locomotive engine which had attached thereto and was hauling a train consisting of about thirteen (13) or fourteen (14) freight cars, mostly loaded with material to be distributed along a portion of said railroad then being constructed by said defendant. And thereafter and on the same day at 8.30 o'clock said engine and train arrived at the South Canadian River; which it was necessary for said train to cross to distribute said building material that on the way from said Oklahoma City to said South Canadian river the said J. Pratt, General Superintendent of Construction boarded said train and was carried thereon to said South Canadian river along with this plaintiff and the other regular members of the train crew; that upon the arrival of said engine and train on which were plaintiff, William — the conductor of said construction train, T. Water the engineer of said locomotive, John. Moore, brakeman, and the said J. Pratt, The General Superintendent of Construction, they found a bridge gang in the employ of said defendant, consisting of — Fallahy, foreman, and about twenty (20) men engaged in repairing the railroad bridge which had previously been constructed by said defendant over and across the said South Canadian River, whereupon, by direction of the said General Superintendent of Construction and the said Foreman of said bridge gang, the said engine and train were stopped and delayed on the north side of said river for a period of about one and one-half hours in order that said bridge might be repaired so that plaintiff and the other members of said train crew could safely cross said bridge with their said locomotive engine and train attached thereto; that, at the expiration of said period of time the said Foreman of said bridge gang and the said superintendent of construction advised the Conductor, the said Engineer and this plaintiff of said train, that they could safely proceed to cross said bridge with

34 the said engine and train, whereupon the said engineer and this plaintiff boarded their said locomotive engine and upon a signal from the said conductor started said engine and train forward and proceeded in a very careful and cautious manner upon said bridge for the purpose of crossing same and when said engine had reached a point immediately over the main current of the water in said stream the said bridge, by reason of the negligent and unskillful manner in which same was constructed and the negligent and unskillful manner in which the supports thereof were placed by said defendant and because of the failure of said defendant to place proper and sufficient supports and braces under and against said bridge, gave way and the said engine fell through said bridge and into the main channel of the said stream, whereby this plaintiff received the said injuries hereinbefore referred to which are the following to wit: two compound fractures of the left leg above the knee with a complete crushing of the bone (femur) between said

two fractures, a distance of about three and one half or four inches, splitting of the small bone of the left leg just below the knee and on the outside of said leg for a distance of about one and one-half inches, a severe intercapsular fracture of hip, all of which said injuries are permanent and have greatly impaired the use of plaintiff's said left leg. In addition to said foregoing injuries plaintiff was badly crushed in the small of the back and lower portion of the abdomen*t* by having been caught between the wing of the tank and cab of said locomotive engine and was also very nearly drowned having been held under the water for about a minute immediately after the fall of said engine by reason of his being fastened between said cab and the said tank and then after having finally succeeded in getting out of said cab and reaching the surface of the water in said stream he became tangled in a portion of the wreck of said bridge and was twice again carried under the water and remained there for several seconds each time.

35 That, by reason of all of which said injuries plaintiff has undergone great physical pain and mental anguish and was confined to his bed at the St. Anthony's Hospital in Oklahoma City, for a period of seven weeks and was compelled to remain in said hospital under the care of a physician and surgeon for a period of more than two months; and still suffers, at times considerable pain in his left hip and knee.

Plaintiff further states that he has been unable to perform any labor or earn any means whatever since the receipt of said above described injuries and is informed by competent p-ysicians, and verily believes, that, at least, a portion of said injuries will be permanent and will greatly decrease his physicial strength and his capacity for earning money; also that he is 32 years of age and prior to said injuries, was an able bodied man, and in robust health, and was a competent and skilled brakeman and locomotive fireman, and while working in the latter capacity had acquired considerable knowledge of the duties of a locomotive engineer, and had, in fact, on various occasions acted in the capacity of such engineer and was able to earn as such fireman, the sum of seventy-five dollars ($75.00) per month. By reason of all of which he has suffered damage in the sum of $20,000.00.

Wherefore plaintiff prays judgment against said defendant for the said sum of Twenty thousand dollars ($20,000.00) together with the costs of this action, and for all other just and proper relief.

JOHN H. WRIGHT,
SHARTEL, KEATON & WELLS,
Attorneys for Plaintiff.

Endorsed: #3548. In the District Court of Oklahoma County Ok. Ter. William N. Wilson Plaintiff *vs.* McCabe & Steen Construction Co. Defendant Petition filed Oct. 18, 1902, B. D. Shear, Clerk, By J. M. Holcomb, Dep. John H. Wright, Shartel Keaton & Wells, Attorney for Pl'ff.

36 That thereafter, upon a precipe, duly filed, a summons was duly issued out of the office of said Clerk in said cause, for the above named defendant, McCabe & Steen Construction Company, a corporation, and a return was duly made of the manner of service thereof, on said defendant, and on November 10th, 1902, the said defendant filed in the office of said Clerk, its special appearance therein and motion to quash said summons and set aside the service thereof, which motion was in words and figures as follows, to wit:

37 In the District Court of the Third Judicial District of the Territory of Oklahoma within and for Oklahoma County.

WILLIAM N. WILSON, Plaintiff,
vs.
McCABE & STEEN CONSTRUCTION COMPANY, Defendant.

Motion.

Comes now the defendant herein and appearing specially for the purpose of this motion and for no other purpose, move the court to quash summons and set aside service herein for the following reasons, to wit:

First. The return of the officer does not show said summons to have been served by law as authorized to be made.

Second. Said summons was not served upon any legal superintendent of repairs, freight agents, agent to sell tickets, or station keeper of the defendant, or upon any person designated by the defendant, by certificate filed in the office of the Clerk of the District Court of Oklahoma County, whose appointment was made by defendant, upon whom service can be made.

LEWIS & SNYDER,
Attorneys for Defendant.

Endorsed: # 3548. William N. Wilson, *vs.* McCabe & Steen. Motion to quash Summons. Filed Nov. 10, 1902, B. D. Shear, Clerk, by I. M. Holcomb Deputy.

38 That thereafter, and on the 21st day of November, 1902, the same being a juridical day of the regular November, 1902 term of the District Court in and for Oklahoma County, Territory of Oklahoma, the said motion of the defendant to quash the summons and set aside the service thereof, came on for hearing before the Court, and said motion was, on due consideration, overruled by the Court, to which the defendant duly excepted and said defendant was thereupon given ten days in which to plead.

Thereafter, to wit, on the 1st day of December, 1902, the said defendant filed in the office of said Clerk its answer to the petition filed in said cause, which answer was in words and figures as follows, to wit:

39 TERRITORY OF OKLAHOMA, *County of Oklahoma:*

In the District Court.

WILLIAM N. WILSON, Plaintiff,
vs.
McCABE & STEEN CONSTRUCTION COMPANY, a Corporation, Defendant.

Answer.

Comes now McCabe & Steen Construction Company a corporation, defendant, by its attorneys and for answer denies all and singular the allegations contained in the petition, and demands strict proof thereof and of this it puts itself upon the country.

LEWIS & SNYDER,
MOSLEY & EPPSTEIN,
Attorneys for Defendant.

And for special answer in this behalf, said defendant by its attorneys says that if it was true that plaintiff was injured at the time and place alleged in the petition, which this defendant in no wise admits, the same was due to the act and negligence of a fellow-servant, and was not due to *to* the act or negligence of this defendant, or of any person who represented it, and this it is ready to verify.

LEWIS & SNYDER,
MOSLEY & EPPSTEIN,
Attorneys for Defendant.

And the said defendant comes and for further special answer, by its attorneys says that if the plaintiff was injured at the time and place alleged in the petition, which this defendant in no wise admits but specially denies, then it says that the injuries received by him were not due to the negligence or want of care of this defendant, or any of its employees, but was due to one of the risks assumed by the plaintiff in his contract of employment with this defendant
40 and for which this defendant is in no way liable, and this it is ready to verify.

LEWIS & SNYDER,
MOSLEY & EPPSTEIN,
Attorneys for Defendant.

And the said defendant comes by its attorneys and for further special answer says that if the said plaintiff was injured at the time, place and in the manner alleged in the petition, which is not admitted by this defendant but specially denied, then this defendant says that the injuries so sustained by the plaintiff were due in whole or in part to the negligence, or want of ordinary care, on the part of the plaintiff himself, and that without such negligence and want of

ordinary care, the plaintiff would not have sustained such injuries, and this it is ready to verify.

LEWIS & SNYDER,
MOSLEY & EPPSTEIN,
Attorneys for Defendant.

Endorsed: #3548. William N. Wilson, *vs.* McCabe & Steen Construction Company, a corporation Defendant, Answer. Lewis & Snyder, Mosley & Eppstein, Attorneys for Defendant. Filed Dec. 1, 1902. B. D. Shear, Clerk.

41 That thereafter, and on the 28th day of October, A. D. 1903, the said cause came duly on to be heard at the City of Oklahoma City, in said County and District, before the Hon. B. F. Burwell, presiding judge, at which time and place the plaintiff was present in person and by his attorneys, Messrs. Shartel, Keaton & Wells, and the defendant was present by its attorneys Messrs. Mosley & Eppstein and Snyder & Clark; and the issues being joined and the case declared ready for trial, the trial of said cause was duly had.

Thereupon twelve men were duly called, tried, sworn and empannelled as a jury to try said cause. Whereupon each side makes its statement of facts expected to be proven on behalf of their respective clients, to the Court and Jury.

Whereupon the witnesses, having been called, sworn and admonished by the court, were introduced and examined in the order and as set out in the "Transcript of Evidence"; and all of the proceedings upon said trial, until the conclusion of the introduction of evidence, and embracing all the exhibits referred to upon said trial, are correctly recited in the "Transcript of Evidence" covering pages 12 to 186, both inclusive, of this case made and being as follows:

42 *"Transcript of Evidence."*

Examination conducted by J. R. KEATON:

Q. State your name.
A. T. Watters.
Q. What is your business?
A. Engineer, Locomotive engineer.
Q. Were you in the employ of McCabe & Steen Construction Company?
A. Yes sir.
Q. When were you employed by them?
A. From May 10th, '92, to December 10th, '92.
Q. How long ago was that?
A. A year ago.
Q. This is 1903 is it not?
A. I mean 1902.
Q. Are you acquainted with the plaintiff?
A. The fireman, yes sir.

Q. State whether or not he was fireman on the train you wa running?

A. Yes sir he was firing for me at the time we had the acciden

Q. How long had he been with you?

A. About a month. That is he had been firing for me a mont but he had been working around there a little over a month.

Q. Do you remember the circumstances of your engine fallin through the bridge on the South Canadian?

A. Yes sir.

Q. Remember the date?

A. Yes sir.

Q. What date?

A. June 9th.

Q. About what time of day did you reach the bridge?

A. About 8 o'clock, may have been about 8:10 or 15, my bes recollection is about 8:05.

43 Q. Do you know who was on the train?

A. Yes sir.

Q. Names them.

A. The brakeman whose name I do not just remember, and th conductor—the conductor's name was Mathers but we called hin Mazoo—and the head brakeman, I don't remember who he was.—

Q. Was there anybody else on your train?

A. —Now I remember the head brakeman, his name is—well, can't remember his name.

Q. Was there anyone else on your train outside of the train crew

A. There may have been someone on it.

Q. Was there anyone of McCabe and Steen's?

A. Mr. Pratt.

Q. Who is Mr. Pratt?

A. Superintendent of construction.

Q. Was he the man that employed you?

A. Yes sir, yes sir.

Q. Now then when you got down to this bridge what did you d with reference to crossing it?

A. We always had an order to go down to the bridge and stop and see if everything was safe and then cross over, and that's what we did.

Q. Before you went onto the bridge, did you get the signal?

A. Yes sir, and then went over and got the car.

Q. The first,—did you go over then?

A. No sir, we did not, we started and then backed off.

Q. How long did you stay there?

A. Long enough for them to repair the bridge. Took a cable *cable* and pulled the piles back and made it more secure.

Q. How many minutes did this take?

A. Probably fifty.

Q. That was after you started on with your engine and backed off?

44 A. Yes sir.

Q. You had been over to get the car?

A. They had fixed the bridge for us and reported it all right.

Q. Who said that?
A. Mr. Pratt also Mr. Fallahay.
Q. Who was Mr. Fallahay?
A. Well, he is a bridge builder they had there, building bridges for them—bridge foreman of the gang.
Q. When they told you that what did you do then?
A. We crossed over after this car.
Q. Where was it?
A. Over near to the middle of the stream,—about middle ways of the stream.
Q. When you got over to the car what did you do then?
A. We got the car and Mr. Fallahay walked along over the bridge to see if it was safe and also inspect it.
Q. How long did you remain over there before you started back?
A. Something like fifteen minutes or half an hour.
Q. Who held you there? (Objected to.) Well, I'll change that, why did you remain there?
A. Just waiting——
Q. Who told you to stay there?
A. We was just waiting for a signal to come back over the bridge.
Q. What were they doing—Mr. Fallahay and Mr. Pratt and these bridge constructors?
A. They was down under the bridge working on it.
Q. When you come back across with that car and the engine what did you do then?
A. The conductor told me that we had some freight to unload—to stop in front of the bridge man's camp—that is on this side of the stream—and as we got on to the bridge coming over I heard Mr. Fallahay say "Look out Tut" and I did look out for myself, I saw the bridge was going and I went right through the cab window.
45 Q. After you came back with the car how long did you remain on this side of the bridge.
A. Must have been forty-five or fifty minutes.
Q. What was Mr. Pratt and Mr. Fallahay doing?
A. Working on the bridge.
Q. Just before you went on the bridge the last time, state whether or not you had any conversation with Mr. Pratt and Mr. Fallahay with reference to the condition of the bridge.
A. I did. I walked over the bridge with them and we talked about the bridge and if it was safe.
Q. What conversation if any did you have with them?
A. I asked them if the bridge was safe——

(Objected to as hearsay. Overruled. Excepted.)

A. —They was both on the bridge with me and I asked if they thought the bridge was safe and they said it was.
Q. Who said that?
A. Mr. Pratt.
Q. Had you asked him anything about it?
A. I had. I asked him if he thought it was al- right—he said it was.
Q. Now what did you do after that?

A. We went back and did as I told you before—unloaded our freight and started to pull out.

Q. Started across with the train?

A. Yes sir.

Q. Was that the first time?

A. Yes sir—with the whole train.

Q. Now did you see Mr. Wilson after you went back and just before you started across.

A. Yes sir him and the conductor was standing on the top of a flat car.

Q. After you and Mr. Wilson got on the engine did you have any conversation with him?

A. Yes sir—he asked me — the bridge was safe to cross.

46 Q. Did you have any talk with him at all?

A. Yes sir I did.

Q. You may state what he asked you about the bridge.

A. He asked—he just says is it all right.

(Objected to as incompetent. Overruled. Except.)

Q. What did you tell him?

A. I told him it was safe as Mr. Fallahay had said.

Q. You may state now Mr. Waters, whether or not you would have gone on to that bridge but for the fact that Mr. Pratt had assured you that it was safe.

(Object. sustained.)

Q. Now how far out on the bridge did you get when you started over the last time when you saw it was going down?

A. I was probably three or four bents out.

Q. What do you mean by bents?

A. One set of pilings.

Q. Was the river in its normal condition?

A. Indeed it was not it was up very high.

Q. Where were you taking this material—no strike this out—what did you have on your train?

A. Ties and steel and——

Q. Where were you taking it to?

A. Going to Chickasha and probably further.

Q. How far had this line been constructed?

A. It was just some distance the other side of Chickasha. I don't know how far.

10:30 A. M.

Same witness (T. WATERS) recalled, and the examination was proceeded with as follows:

By Mr. KEATON:

Q. Mr. Waters at what rate of speed was your engine moving at the time that the bridge gave way?

47 A. Why it could not have been more than a mile or a mile and a half or two miles an hour; we were going very slow, just moving.

Q. And do you know how the bridge fell, whether it went straight down or over or how?

A. Well, it seemed to me that it kind of leaned down the stream —kind of leaned down the stream.

Q. Did you see Mr. Wilson as it was going down?

A. No, sir, but I seen him just before it was going down—just an instant before.

Q. And when did you next see him?

A. The next time I seen him was when they was taking him out of the water.

Q. And how far was that from where he went down?

A. Well, it was 100 feet, probably more.

Q. Do you know who pulled him out?

A. Yes sir.

Q. Who was it?

A. Well, there was several there pulling him out; Mr. Shaw was one, he helped pull him out, and this bookkeeper and Mr. Waldo.

Q. Did you see him after they got him out?

A. Yes sir.

Q. Did you not examine him?

A. No sir.

Q. Did you see what condition he was in?

A. No sir, I didn't examine him.

Q. Well, you may describe that fall if you can of the engine, from the time it started down?

A. Well, the only thing I know about the fall is that I beat the engine a little bit to the water; that is all there was to it; it came through the timbers and made a straight shoot to the water.

Q. How did you come out?

A. I came through the cab window.

Q. What if anything took place about the timbers falling?

Objected to as leading and suggestive. Overruled. Exception.

48 A. There was a good many timbers fell.

Q. You had been acquainted with Mr. Wilson about how long before this accident?

A. Well, something over a month; I never saw Mr. Wilson until he went to work for McCabe and Steen.

Q. You had not been with him constantly during that time, had you?

A. Well, I had for a month just prior to this, yes sir.

Q. Do you know what his physical condition and appearance was during that time?

A. He seemed to be a well, hearty young man; he seemed to be a strong young fellow.

Q. How was his appearance as to being healthy and strong or otherwise, as compared with his appearance now?

A. Well, he seemed to be a little stronger then than now; he seemed to be heavier then than now.

Q. Did you see any photographs taken?

A. Yes sir.

A. You saw them taken, did you,—of this place?
A. Yes sir.
Q. Do you know who took them?
A. Yes sir, I saw young—I can't remember his name now; he is a young fellow that ran the commissory there——
Q. Did you have any of those photographs?
A. Yes sir.
Q. Have you got any now?
A. Yes, I have got one.
Q. Have you got it here?
A. Yes sir (producing it). I just got it to-day.
Q. Do you know whether this — a correct representation of the appearance of the thing at the time the photograph was taken.
A. Yes sir, I know that.
Q. How long was that taken after the accident?
A. Well, it was taken something like—to the best of my knowledge in the evening, sometime after the accident.
Q. The same day?
A. Yes sir.
49 Q. I will hand you now, another——

The COURT: You had better have this marked.
(The same is marked "Ex. A.")

Q. Did you see that taken (handing him another photo.)?
A. Yes sir, I saw this.
Q. You saw it taken?
A. Yes sir.
Q. Is that a correct representation of the things that appears in it there?
A. Yes sir.

(The same is marked "Ex. B.")

Q. Was that taken the same day?
A. Yes sir.
Q. By the same photographer?
A. The same man, yes sir.

Mr. KEATON: We offer the photograph marked and identified as "Exhibit A" in evidence.
(The same is now exhibited to the jury.)
(It appears in this case made at page 182.)
Mr. KEATON: I also now offer in evidence the photograph identified as "Exhibit B."
(Here said Exhibit B is also exhibited to the jury.)
(It appears in this case made at page 182.)

Q. Now, on this photograph identified here as "Exhibit A" I notice something on the left hand side of the photograph as you look at it; what is that?
A. This here?
Q. Yes?
A. This is that car, and this here is the piling.

Q. Under the car is the piling?
A. Yes sir.
Q. Now was that car in front of the engine or behind it.
A. It was in front of the engine; that is the car that had the pump on it,—the car that we went over after.
Q. What does this round thing represent?
A. That is the smokestack on the engine.
Q. And what is this right back to the right of the——
A. —That is the cab——
Q. And this to the right?
A. That is the tank or tender.
Q. Now, I notice on this marked "Ex. B" a round——
A. —That is the stack, smoke stack.
50 Q. It seems to be lower here——
A. Well, I think it is on account of this picture being taken from the opposite view than that one there.
Q. Now, do you know whether or not the engine settled any lower?
A. Yes sir.
Q. —Settled down any lower than it was when it first stopped?
A. Yes, I think it settled down some.
Q. Mr. Waters, had you ever had any experience prior to this time with constructing bridges, railroad bridges of any kind?
A. No sir, I never knew anything about that at all.

Cross-examination.

By Mr. MOSELEY:

Q. Mr. Waters, where do you live now?
A. I am working on the V. S. & P. at the station of Ruston, between Shreveport and Vicksburg, Miss. I am at present on a work train, at Ruston, La.
Q. What are you doing there?
A. I am running a locomotive.
Q. Locomotive engineer?
A. Yes sir.
Q. How long have you been down in that country?
A. Well, I have been down there very near six months on the V. S. & P.
Q. How long did you continue in the service of McCabe & Steen after this accident?
A. Well, lets see; from June 9th until December 10th.
Q. In 1902?
A. Yes sir.
Q. You left them on December 10th, 1902?
A. Yes sir.
Q. Not quite a year?
A. No sir.
Q. And what was the next job you had?
A. Well, I didn't do anything at all, I was going to work on the

L. & N. and got the small pox and was one month in the pest house.

51 Q. Then this job at Shreveport was the first job you had after you left their service?

—. Yes sir.

Q. Is this job still continuing?

A. Yes sir.

Q. What is your business here now?

A. Well, I came up to Greenville, Tex.; I have some folks living there, and I came up here to see about a lot, and also about this suit.

Q. Is it not a fact that your business here is as a witness in this law-suit?

A. That is part of it, yes sir.

Q. And but for that you would not be here?

A. I could not say as to that; I promised to come here as a witness.

Q. Why did you quit the service of McCabe & Steen?

A. Well sir, I had some little difficulty out there with McCabe's foreman, and I thought it was best for me to leave.

Q. You quit their service because you had trouble?

A. That was one thing, and then I had another job in view.

Q. Did the trouble that you had make any condition of ill will in your mind,—create an ill feeling?

A. No sir, not altogether; it did at one time.

Q. The fact is true however that you have had a difficulty and have come here to testify in this lawsuit?

A. Yes sir.

Q. Now prior to the time that you took service with McCabe and Steen, what business had you been employed in?

A. Engineer.

Q. Where?

A. On the Union Pacific.

Q. For how long?

A. Very near three years.

Q. You had been an engineer for three years?

A. That is, I had there.

Q. Well, for how many years have you been locomotive engineer?

A. Pretty near ten years.

Q. Was that on the railroad?

A. On the railroad.

Q. And prior to that time, did you perform any service with reference to steam engines?—work on an engine?

A. Yes sir.

52 Q. You had in fact served a long time as fireman of locomotives?

A. Yes sir.

Q. For how many years had you been a fireman?

A. Well sir, I was firing in '82.

Q. In '82 you began firing?

A. Yes sir.

Q. You had been in that line of business operating an engine, in one capacity or another, about 20 years?

A. Off and on, yes sir.

Q. Before this accident occurred?

A. Yes sir.

Q. During that time Mr. Waters, you have gained some familiarity with bridges, the conditions at low water and high water and things of that kind?

A. Certainly, I know when a river is up and I know when it is down.

Q. Had you ever done any construction work prior to that time?

A. Never worked at construction in my life before, that I never was building a railroad.

Q. Now, you say that you knew Mr. Wilson about a month before the accident?

A. Probably a little over a month.

Q. How did you become acquainted with him?

A. Over here at the works of McCabe and Steen.

Q. What do you mean by their works?

A. Over here where they are building this new railroad.

Q. When you first saw him was he serving as your fireman, or beginning to serve as your fireman?

A. When I first seen him, no sir; he was firing for another man by the name of Madden.

Q. How long did he fire for you prior to the accident?

A. I don't remember how long it was.

Q. Could you not approximate it?

A. No sir, I don't know how long it was, I could not approximate it.

Q. Now, do you know whether he had been employed prior to that time?

A. No sir; only what he told me.

53 Q. Well, what did he tell you?

A. He told me he came off the Frisco.

Q. Did he tell you how long he had been in the service of the Frisco?

A. No sir, I never asked him any questions at all.

Q. You say he was an abled bodied man?

A. Yes sir.

Q. An experienced fireman?

A. Yes.

Q. Before he entered his job?

A. Yes sir.

Q. Did he tell you how many years he had been working as fireman?

A. No sir.

Q. Now then, let's see, can you tell us the time or the date at which you began to run and engine, a locomotive engine, for McCabe & Steen?

A. Yes sir, I can pretty near tell you the time.

Q. All right.

A. It was May 10th.
Q. May 10th, 1902?
A. Yes. May the 8th, 9th or 10th somewhere along there.
Q. Just a month before this accident?
A. Yes sir.
Q. Now where did you work before that accident?
A. Well, I worked mostly before that time here in the yard.

Whereupon, by agreement this witness is withdrawn, in order that certain other witnesses who are pressed for time may be examined.

J. B. ROLLATER (Dr.) is here called to the witness stand by the plaintiff and gives the following testimony under oath:—

By Mr. KEATON:

Q. What is your business or profession, Doctor?
A. Physician.
Q. How long have you been engaged in that line?
A. Nineteen years.
Q. Are you acquainted with the plaintiff here, Mr. Wilson?
A. I am.
Q. Did you see him on June 12th?
A. I saw him about June, 1902, first.
Q. Were you employed by anyone to treat him?
A. I was.
Q. By whom?
A. McCabe & Steen.
Q. What was his condition, Doctor, when you first commenced that treatment; what condition did you find him in?
54 A. I first saw him at St. Anthony's hospital in this city, and found him with a fracture of the left elbow, and an intercap-ular fracture of the hip joint, and that is a fracture within the hip joint. I also found him with a fracture about four inches from the lower end of the femur.
Q. Just state to the jury what you mean by "femur?"
A. It is the long bone of the thigh, the only bone.
Q. About four inches, you say, from the lower end of that bone?
A. Yes sir.
Q. That would be four inches above the knee?
A. Four inches above the knee.
Q. What kind of a fracture did you find there?
A. A comminuted fracture.
Q. Describe that to the jury?
A. It is a fracture in which the bone is severed into a number of pieces, that is, two or more.
Q. Well, can you tell about how many pieces this bone had been broken into?
A. Why, I could not; quite a number; it was broken vertically—that is cross ways, and split along the axis of the bone in between the trocatis into the knee joint; the trocatis are the prominences on the sides of the bone at the lower end—just at this point (indicating)—splitting the bone down between this and this.

Q. Now, which leg was it, Doctor?
A. It was the left leg.
Q. Now just locate it if you can,—just about where that fracture was?
A. (Complying) Just about four inches above the knee, across this way, and then down into the joint.
Q. And you say that there was more than two pieces.
A. Yes sir.
Q. But you could not state how many?
A. No, I could not state.
Q. Now where was the other injury?
55 A. In the hip joint.
Q. And what was that;—you said it was an intercap-ular fracture.
A. Intercapsular fracture, that is, within the capsule of the joint.
Q. That is in the socket?
A. In the neck.
Q. In the neck of this right here? (indicating.)
A. Yes sir.
Q. Now what other injuries did you discover there?
A. He had a number of minor injuries; bruises all over the body and in the region of the bladder there was some injuries, as though he had had a blow.
Q. Had his clothing been changed when you saw him first?
A. I don't remember that; I don't remember to have noticed.
Q. Now you may explain to the jury whether or not that fracture of the neck of the hip bone there is a serious or difficult one or otherwise?
A. It is regarded as a serious fracture, when you consider the results that you are likely to get.
Q. And what are those results, Doctor?
A. Usually?
Q. Yes?
A. Shortening of the leg, sometimes non-union.
The COURT: What do you mean by non-union?
A. It does not unite; it does not grow together again.
Q. And what about this fracture down there as you found it, as to being serious or otherwise?
A. It is also regarded as a serious fracture, on account of inflammation of the joint.
Q. Now, you have examined Mr. Wilson again by order *order* of the court, or request, have you, to day?
Q. You may state what condition you found him in?
A. I found that the limbs are both—are the same length. I found the result in the hip perfect so far as you could decide—the lower end of the bone—the fractured end,—the lower end of the bone is
56 united. It is perceptible that he has had a fracture there. The action of the knee joint is perfect so far as motion is concerned. There is a slight thickening of the bone, but it does not interfere with flexion or extension.
Q. What about the knee, the cap?

A. On account of the slight separation of the bone in its union, or the separation at the time of its fracutre, the points of the bone being very slightly apart,—the slight resting of the knee cap, the patella.

Q. Well, in flexing this limb at the knee joint, state whether or not there was any tenderness or any pain complained of by Mr. Wilson, to day?

A. It was complained of by Mr. Wilson, but I could not, from the examination, tell that there was anything.

Q. Of course you took the leg and moved it as you wanted to?

A. Yes sir.

Q. And was there likely any trouble there or tenderness or weakness, or anything of that kind,—or could you tell?

A. Well, there could be, I don't know whether there is or not.

Q. You cannot tell?

A. I cannot tell.

Q. That would be a probable result?

A. Yes sir.

Q. And how about the hip joint? Altho- you have got a perfect union as far as you could tell, is the condition weaker, or more painful occasionally, than it would have been otherwise?

A. The authority is divided on that; some say that a bone broken and united is stronger at that point than any other.

Q. Well, what is your opinion?

A. I have never seen one broken off at that point have a complete result.

Q. Now as to being as perfect as it would have been, so that he could stand on it or lift with it, or would it be rheumatic—

57 what would be the likely or probable result?

A. I think where the bone is united the result should be perfect, only a man may express more or less pain following the fracture; I don't know such to be the case; it could be.

Q. How long was he under your care there Doctor, at the hospital?

A. I don't know the exact time, six or eight weeks.

Q. And you did not treat him then since,—You had not seen him or examined him since he left the hospital until to day?

A. I saw him for some days after he left the hospital; he was around town; I don't think I saw him professionally any more after he left the hospital, unless it was just about some minor trouble.

Q. Did you find anything else Doctor, on that limb that was probably the result of these injuries?

A. I found on examination to day, a fatty tissue under the skin at one point, marking the line across the thigh,—had been absorbed; that is probably the result of the bruising of the tissue and the absorption of the fatty tissue.

Q. It leaves a depression?

A. Just a little depression under the skin, showing externally.

Q. In fact, with this case, you got as good result as could have been expected, if not better, didn't you Doctor, as far as you could see?

A. That is a kind of tender question to ask a Doctor; I think that it was the best that I ever saw; the best that I ever had.
Q. With that kind of an injury.
A. With that kind.

Cross-examination.

By Mr. MOSLEY:

Q. When did you discharge your patient there with reference to the time of the injury,—the injury is shown to have occurred on June 9th, 1902?
58 A. I discharged him at the time he left the hospital.
Q. Do you remember about when that was?
A. I do not.
Q. Now, what was his condition then with reference of the knitting of the bone?
A. The union was perfect at that time, but on account of want of use of the muscles, and for the bone to have become solid, we didn't allow him to walk on his leg, but asked him to use crutches.
Q. Was he still using crutches the last time you saw him?
A. I saw him, I think, with a cane,—I know—with a cane and a crutch.
Q. How long a time would it have been necessary in your judgment for him to have continued to use either the crutches or the cane, after you had discharged him?
A. Well, I would think from four to six weeks.

10:15 Recess for ten minutes.

Q. Doctor, you have stated that in your opinion he would have to use the crutches or stick for as much as six weeks following the time of his discharge; I ask you the question, what, in your judgment at that time, would be the condition of his limb with reference to use at the end of that six weeks?
A. That is, whether he could use it or not?
Q. Yes?
A. I would think so, yes.
Q. Without crutches or stock?
A. Yes, unless it was merely a stick for support or something of the kind, for protection. As far as using it, I think he could use it all right, and could bear his weight on it; but we never say to a party not to use a stick, because to a certain extent is supports him and in going long distances and in going down a decline or anything of that kind it is some protection to him, and I don't suppose he had perfect confidence in the limb yet.
59 Q. Now in what length of time ought he to have recovered entire confidence in this limb?
A. That would vary with individuals.
Q. What would be the ordinary time?
A. I don't think a man could state that.
Q. Can that limb bear his weight now?
A. Yes sir.

Q. How does that limb compare in strength, in your judgment, with the other limb?

A. In strength?

Q. Yes sir?

A. Well, I think it is practically as stout as the other limb; I don't see why it should not be.

Q. How does it compare in suppleness with the other limb—in flexibility?

A. My manipulation showed a perfect movement of the joint.

Q. Equal to the other limb?

A. I found no difference in them, none that I could mark.

Q. I wish Doctor, you would explain again the condition of the patella—the knee cap?

A. The condyles of the femur being separated at the time of the fracture the union took place in such a way as to allow a slight separation and a slight resetting of the knee cap; in other words, the knee cap is not quite so prominent as on the opposite side—which is slightly out——

Q. Now, as I understand you, the femur widened out a little at the bottom?

A. Yes a little separation.

Q. A little wider?

A. Yes sir.

A. And consequently the knee cap sunk a little closer to the bone, is that the idea?

A. Yes, that is it.

Q. Now, otherwise the knee cap is in perfect condition—position?

A. Yes sir.

Q. Are any of the muscles or ligaments that are normally
60 back of the knee cap or that portion of the leg, turned under too, or are they intact?

A. They are all intact as far as I could find.

Q. If they were not intact would you be able to discover it?

A. If there was distruction of the tissues, I could.

Q. Would your examination today have brought that fact to light?

A. Yes sir.

Q. Now what is the difficulty; what is there about the knee cap, or condition of it at the present time, that would lead you to expect pain to result to him, or disturbance in the movement of the leg, at the knee?

A. There is really no condition that would lead me to suspect that he would have pain in the knee.

Q. Is there any tissue that is in the way on such movement of the leg?

A. No sir.

Q. Nothing in that movement that would operate unnaturally, to produce irritation?

A. None that I could find.

Q. Is there any reason, Doctor, that irritation should exist there, at the present time?

A. Physicians could not say that there was pain or irritation

there; they could only give it as a result—the probability—from the fracture of the bone, which is placed so that it naturally gives some pain after uniting.

Q. I don't know that I quite understand; you mean immediately upon the uniting that pain will continue?

A. No, I mean that in fractures—in bad fractures, that patients tell us that they sometimes experience some pain,—some unpleasant feeling.

Q. In the bone or in the muscle?

A. Generally they describe it locally from the point of
61 fracture; we don't know that such exists.

Q. You don't know?

A. We don't know that such exists.

Q. You could only, in reaching your conclusion, reason with reference to the location of the various parts that were affected, as to whether or not there was any places that didn't perform their various functions?

A. Yes sir.

Q. And you found that they performed their proper functions in the present case?

A. I did.

Q. Now Doctor, you spoke of the absorbtion of some fatty tissues on the leg, does that involve the muscles or the nerves?

A. Just that interlaying fat of the skin; it does not involve the muscles at all.

Q. Or the nerves?

A. No sir.

Q. Or the blood vessels?

A. No sir.

Q. Does that either affect the strength or the usefulness of the limb?

A. No sir.

Q. You say that is the result of a bruise?

A. Presumably that is the only thing we could say that caused it; that would cause it.

Q. Would the natural tendency be for nature to repair that, and fill that up, or for it to grow worse?

A. It will always remain as it is; it amounts to nothing.

Q. Doctor, you say that the ordinary effect or result of an intercapsular injury to the hip is to shorten the leg?

A. Yes sir.

Q. But that that result has not ensued in the present case?

A. It has not.

Q. Did you doctor this man for any injuries to the kidneys?

A. I did not.

Q. You say you found an injury over the bladder?

A. Yes sir.

62 Q. Well, did that injury affect the bladder?

A. He complained of the —, just the skin over the bladder—was the only thing. Probably had some little disturbance or irritation about the bladder; I don't remember about that; but it passed off in the course of a few days.

Q. Was that injury an internal or external injury,—the one to which you refer?

A. It was external as far as I could see.

Q. If it had been of an internal nature would you have discovered it Doctor, from your treatment of it?

A. Had it involved the bladder I would.

Q. That then, Doctor amounted to this; that it was a bruise in the lower part of the body?

A. That is what I regarded it as—merely a bruise.

Q. And that got well?

A. Yes sir.

Q. Doctor, is this man in a condition to perform physical labor at the present time?

A. Yes sir.

Q. From your examination of it and your knowledge of him before and treatment of his case, how long a time would you say that he has been in a condition to perform physical labor; for instance, the work of a fireman on a locomotive engine.

A. Do you mean how long has he been in that condition.

The COURT:

Q. How long is it since he has been able to perform the labors of a locomotive fireman?

A. Judg*ment* from the condition that he was in when he left me, I would think that he should have been able to have done so in six months.

Q. In six months from the time he left you?

A. Yes sir.

Q. Does your examination of it corroborate that former opinion?

A. It does.

Q. It does?

A. Yes sir.

Q. Doctor, were you paid for your attention and services to Mr. Wilson?

A. I was.

Q. Who paid you?

A. McCabe and Steen.

63 That is all.

Redirect examination.

By Mr. KEATON:

Q. Now, Doctor, you say that people have fractures,—almost all fractures, that complain afterwards for an indefinite length of time of pain there in the locality of the fracture—would the severity of the fractures,—or would the nature of the fracture, have anything to do with the severity of the pain afterwards, as to whether,—There are different kinds of fractures, are there not?

A. Yes sir.

Q. Was this a simple or a comminuted one?

A. Yes sir.

Q. Well, what is the difference in a simple fracture and a comminuted fracture?

A. A simple fracture is where the *pain* is merely broken.

Q. Just broken in two?

A. Yes sir.

Q. And then comminuted is where it is broken in pieces?

A. Yes sir.

Q. And that is the condition you found there?

A. Yes sir.

Q. Now what kind of a fracture would be the more likely to cause pain afterwards—that kind of a simple fracture,—after the bone united?

A. The question of pain in fractures is a thing we know professionally nothing about; we don't know it; we don't experience it.

Q. But you do know, however, what your patients say?

A. Yes sir.

Q. Well, you know it simply like you know other things that you cannot see, and I am asking you whether it is not a fact, that a comminuted fracture would be more likely to be painful afterwards than a simple fracture?

A. I see no reason——

64 Q. —Where these bones are broken up into small pieces, is it not a fact that there might be more pain and friction between them—more than a simple fracture?

A. No, there is a plastic exidus thrown out between the fragments of the bone and if there was a displacement of those bones we all know it from the roughness or shortening of the limb or some other result.

Q. Yes, but where it is down in the knee joint here, can you tell from an outside examination whether it is in fact enlarged some what—just exactly what the condition is inside?

A. I think so.

Q. You think you can?

A. Yes sir.

Q. Well, can you tell now, from outside examination, just exactly whether the tissues in there have perfectly united or whether there is any trouble at all in that knee joint?

A. We can if physical symptoms count for anything.

Q. But is it not a fact that you cannot determine just exactly always about physical symptoms at all—just exactly what the condition is inside?

A. Well, if there is anything wrong we should either have redness, swelling or some of the manifestations of a disturbed functioning of the part.

Q. You did not examine this with an ex-ray to see just exactly how this bone is in there?

A. No, I don't know anything about the x-ray.

Q. Now, as to this injury in the body, or in the lower part of the body; you said that he complained of a pain in the pelvis; just describe to the jury what the pelvis is?

A. The pelvis is that portion of the body made up by five distinct

bones occupying the lower portion of the trunk; in other words, this is the space that we describe as the pelvis (indicating).

Q. Now, there might have been some internal injuries there that you didn't discover or that didn't develop at that time, might there not?

65 A. I think that if there had been any injuries I would have likely noticed them; had there been an injury of the bladder, I would have noticed it; had there been an injury to the rectum, or that part through which the rectum passes—the bony structure; and if there had been a displacement of any of the bones at that point I would have noticed it.

Q. Did you notice Mr. Wilson spitting up any blood; do you remember anything about that?

A. Why, I don't remember about that exactly; I don't really remember.

Q. Whether he did or not?

A. Whether he did or did not.

Q. Did you see bruises on a number of places on his body?

A. Yes sir.

Q. Doctor, are you in the employ of McCabe and Steen now?

A. No sir.

A. K. WEST was the next witness called to the stand by the plaintiff and gave the following testimony under oath:—

By Mr. KEATON:

Q. Where do you live Doctor?

A. Oklahoma City.

Q. How long have you lived here Doctor?

A. Five years.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been engaged in that business?

A. About ten years.

Q. You assisted or were present and participated in the examination of Mr. Wilson today with Doctor Rollater, did you?

A. Yes sir.

Q. You may describe to the jury what you found as evidence of any injury in the limb that you examined?

A. I found a thickening of the lower end of the left thigh bone; a little spreading of the condoyles or prominences on either side of the joint; I found a scar about midway of the thing on the same side,—scar that left a depression at that point as a result of

66 the condition I described of the knee joint; there was also a slight deviation from the normal location of the knee cap; I found nothing further as I remember.

Q. You could not tell anything about whether there had or had not been a fracture of the neck of the femur?

A. No sir, I examined the hip joint, but I was not able to find any deviation of the normal or ordinary condition.

Q. You have heard Dr. Rollater describe this fracture——

A. Yes.

Q. Its condition at first. What is your opinion Doctor of an injury of that kind being more susceptible, or a limb injured, being more susceptible to disease than otherwise,—than if it had not been broken?

A. It is more susceptible to injury after the healing,—the bone becomes thicker, and in some instances it is stronger than at any other point that is normal. But it does not seem to be quite as well nourished or supplied with blood and is regarded as more liable to disease later on. To illustrate what I mean: an injury to the bone anywhere, years after that, 20 years, 30 years afterwards, may become affected and begin to grow slightly shortened, and there may be a bony growth. And wherever there has been an injury to the bone it is a little more susceptible to disease at that point than a normal bone on the other limb, or a normal bone in any other individual. The same thing is true of other injuries as for instance cancer is more likely to develope in a scar under the skin, than under a portion of the skin which has never been injured.

Q. You have heard Dr. Rollater describe the character of this injury, have you?

A. Yes sir.

Q. Would you regard that as a serious fracture or otherwise,—the one he described above and at the knee joint?

A. Both of those fractures I regard as serious injuries.

67 Q. Well, in your opinion, is that a permanent injury, or otherwise?

A. Well, it is permanent in this respect: the enlargement of the bone; the slightest displacement of the patelle; in fact the condition that it is in now is permanent.

That is all.

Cross-examination.

By Mr. MOSELEY:

Q. You mean the enlarged condition of the bone is permanent?

A. The bone at present is a little larger at the fracture and at the lower extremity than the other bone; and that enlargement is permanent; it will always be larger than the corresponding bone on the other leg.

Q. Is that what you referred to when you said that it would be permanent?

A. Yes sir.

Q. Did you say the bone Doctor at such a fracture will probably become as strong or stronger than it was before?

A. Yes sir.

A. Yes sir.

Q. By reason of the added tissue?

A. Yes sir.

Q. And also the result that you have described as being of an injurious character to the man, is the fact that the bone may after-

wards become diseased—a bone in any portion of a man's body may become diseased, may it not?

A. Yes sir.

Q. Do you think that on account of the matter thrown out from the fracture, that it may become diseased more rapidly than otherwise—that is, than normal?

A. It is slightly more susceptible to disease than a perfectly normal bone would be.

Q. Slightly more susceptible to disease; have you any kind of disease that would attack a bone of that character?

A. Yes sir.

Q. What?

68 A. Osteoma is the commonest of diseases; it is really a bone tumor; it is a tumor in the bone.

Q. A tumor of the bone?

A. Yes sir.

Q. You mean it is the most common disease of the bone?

A. I mean it is one of the most common diseases which is likely to attack an old injury.

Q. Yes, I understand. You don't mean that it is a common disease.

A. Not by any means.

Q. A very rare disease?

A. It is a very rare disease.

Q. And if the bone is attacked at all, it is more likely to be attacked by that disease than any other?

A. I am rather guessing at that; that is my opinion.

Q. Well, that is all.

A. I haven't looked up any authority in regard to the comparative frequency of bone diseases.

Q. Now, if he does not contract that or some similar affectation, he is all right as far as this injury is concerned.

A. Yes; in the vast majority of cases a fracture, after it heals, is just as good as it was before; there is no disability resulting from it.

Q. There is an old saying that a bone broken and healed is stronger than it was before, is there not?

A. Well, there is such a saying; in some cases it might be stronger by virtue of the added tissues; I can't say that it is stronger, it is usually about as strong.

Redirect examination.

By Mr. KEATON:

Q. Now, in flexing the limb to day Doctor, was there any tenderness or apparent tenderness?

A. Yes sir, he complained some of tenderness, of there being some slight pain left in it—in moving it.

69 Q. Now, you speak of bone disease; will not rheumatism and diseases of that kind more readily enter into the hip and knee under these conditions?

A. If the injured one should happen to have rheumatism, there would probably be less resistance in the bone injured, than in a normal joint.

Q. Can you always tell where there has been a com-inuted fracture, and a split in the joint, just what the legitimate result is going to be?

A. No,—especially a split in the joint; the surfaces of the joint are perfectly smooth. Now a split in the joint always results in a little crack in that space; and in the healing process, if that crack is perfectly smooth, there probably will be no sense of pain; but where the patient complains of pain, as we find occasionally, we have — suppose that in the healing process there is a little roughness or roughening at the point of that crack that brings the pain, but there is no way to see in looking at the joint, whether it should be a painful joint or otherwise; we know that there is more or less complaint in moving the joint, and we suppose that when that is the case there is a little roughness as the result of the crack or the stiffness of the joint.

Q. Well, is there a fluid in there, in that space?

A. There is always a little closed sack with a few drops of fluid in the sack.

Q. What is that fluid called?

A. Synovial fluid.

Q. Well, that would be the same thing probably in the fracture of the hip joint, if there was complaint of pain?

A. Why, that is possible, also.

Mr. KEATON: That is all.

T. WATERS is thereupon recalled by the defendant for further cross-examination, and gives the following testimony under oath:

70 By Mr. MOSELEY:

Q. How long had you been operating this locomotive engine for this road that McCabe and Steen were building?

A. Well, I have been working for McCabe and Steen for very near six months.

Q. Well, I mean prior to the injury of Mr. Wilson,—prior to June 9th?

A. You mean after the wreck?

Q. No before the wreck?

The COURT: How long had you been operating this particular engine?

A. I don't just remember how long I had; I had first one engine and then another.

Q. Well, how long had you been operating an engine over that roadway?

A. Do you mean from the time I first began until the wreck?

Q. Yes, up to the time of the injury; you stated before you went out that you had been working in the yard part of the time——

A. Well, I guess it was a little over a month.

Q. You say that you had not been working for them but a month?
A. I had been working for them a little over a month before the wreck occurred.
Q. And you think that you had been operating an engine over the road for about a month?
A. Yes sir.
Q. Now was that over the road or was that in the yard?
A. It was over the road; part of the time it was over the road, and I work sometimes in the yard before we go out over the road.
Q. How many engines were operated by McCabe & Steen?
A. There was four.
Q. Consequently there were four engineers?
A. Yes sir.
Q. And four firemen?
A. Yes sir.
Q. Was that road operated for the carrying of passengers?
A. No sir.
Q. It was not an equipped road was it?
A. No sir.
71 Q. It was a road in the course of construction?
A. Yes sir.
Q. You were assisting in the construction of the road?
A. Yes sir.
Q. And Mr. Wilson was assisting in the construction of the road?
A. Yes sir.
Q. It is a fact that all of the employés of McCabe & Steen were employed there and assisting in the construction of the road, is not that true?
Q. Yes, in hauling material——
Q. —and in one way and another?
A. Yes sir.
Q. Do you know where that road was begun,—at Oklahoma City, was it?
A. That is what I understand; I wasn't here when it was begun.
Q. Where was the other end?
A. I heard that it was at Quanah, Texas, Snyder, Oklahoma, was as far as I ran over that road.
Q. That is in a southwest direction from Oklahoma City?
A. Yes sir.
Q. Now, what did you haul on this train that you pulled with your engine?
A. Hauled ties and rails and such stuff as that.
Q. Who did you haul that for?
A. My understanding was that we hauled them for McCabe & Steen.
Q. In other words, they were supplied to be used in the construction of that road?
A. Yes sir.
Q. Was the road being worked upon at one point or at different points along, or up to the front?

A. Well, once in a while they would have a gang out this way working, but most of the time they was towards the front.

Q. Is it not true that they were building depots?

A. Yes sir.

Q. And bridges and painting depots?

A. Yes sir.

Q. And putting up water tanks, as well as surveying and laying tracks?

A. Yes sir, they generally kept pretty well up with the work.

Q. Now it was your duty on this train to fill it and haul supplies and material for the building of the road?

72 A. Yes, that was my understanding; hauling material; that is what I said I had to do.

Q. In other words, you would stop at different places where they were building stations and section houses, and put down material and supplies?

A. Yes sir.

Q. And at another time you would stop where they were building bridges and put off material and supplies?

A. Yes sir.

Q. And at other times you would stop where they were working at surfacing too——

A. Yes sir, they generally had a crew there that would take it off——

Q. And you hauled material and supplies to every point along the road where construction was going on?

A. Yes sir.

Q. Now where would be your head quarters,—at Oklahoma City, or out where they were building—out at the front?

A. Well, my headquarters was mostly in Oklahoma City, at that time.

Q. When was the last trip that you took, prior to this one when the accident occurred?

A. I came in the night before,—before the accident occurred.

Q. Do you know the day of the week when the accident occurred?

A. I believe it was on Sunday; I am not certain though; I don't remember now the day of the week.

Q. To refresh your memory, did not the accident occur on Monday?

A. I could not say; I don't remember.

Q. Well, when you came in the day before where did you come from?

A. Came from Chickasha.

Q. Came to town?

A. Yes sir.

Q. Ran an engine in?

A. Yes sir.

Q. Did Mr. Wilson help you?

A. Yes sir.

Q. Wilson came with you as your fireman?

A. Yes sir.

Q. On the day before the accident occurred?
A. Yes sir.
Q. You necessarily had to pass over the same part of the road?
73 A. Yes sir.
Q. In other words, you felt the train cross over the bridge?
A. We came to Oklahoma City over that road.
Q. Did you have any trouble?
A. No sir.
Q. What time did you get in to Oklahoma City?
A. We got into Oklahoma City sometime after dark; I know we passed over the bridge just after dark.
Q. What time did you start out the next day?
A. Well, I started out pretty early, about 6:20; something like that.
Q. Got a load here in the meantime?
A. Yes sir.
Q. Got away from here at the depot?
A. —Over here about a mile, a mile and a half or a mile and a quarter.
Q. Where were the supplies kept; was there *at* depot for those supplies?
A. Yes, over here about a mile or more.
Q. At this end of the road?
A. Yes sir.
Q. So that when you needed supplies to take out in front, you had to come to Oklahoma City to take them out?
A. Yes sir.
Q. Did you stop at the bridge when you came in?
A. Why we slowed up until we got a signal to come across; it was our orders to get a signal before we crossed that bridge,—that was our orders from the bulletin.
Q. You had a bulletin?
A. Yes sir.
Q. What do you mean by a bulletin?
A. It is an order to come to a full stop at the Canadian river bridge, and receive the signal.
Q. Was that bulletin in writing?
A. Yes sir, in writing.
Q. Writing or printing?
A. Well, it was in printing most—typewriting.
Q. Who was it signed by?
A. McCabe & Steen.
74 Q. Now you testified this morning that that bulletin was that you should stop at that bridge and see that everything was safe and secure before you crossed it?
A. Yes, and to get the sign-; if I came to that bridge I could see if there was anything out there or not, to prevent me from going over.
A. —All right; I don't want to have an argument with you. Now do you still give the same testimony that you gave before noon, that

the bulletin was that you were to stop at that bridge and see that everything was safe and secure before crossing it?

A. Yes, we was to stop there, and to see, and find out if it was secure and get a signal to come across.

Q. Safe and secure?

A. Yes sir.

Objected to.

The COURT: He has already answered you once,—two or three times, in fact.

Q. Now, what about the signal?

A. Stop and get the signal from the foreman or whoever was working on the bridge, to come across.

Q. You did not say that this morning about the signal, did you?

A. Yes, sir, this morning—to get the signal; we stopped at the bridge and got the signal and came across.

Q. Now, were you to stop there for the signal, or were you to stop there to see that everything was safe and clear?

A. I was to stop there to get the signal to come across the bridge.

Q. Suppose, under that bulletin, you got there and there was nobody there to give the signal, would you stand there until somebody came?

A. Yes, but there was always somebody there to give us the signal, all the time I was working there.

Q. In other words, if you had gotten there and nobody had been there, and the bridge was completed, you would not have crossed it?

A. No sir, because I had a bulletin to stop and get the signal.

75 Q. No, you do not say now that you got the bulletin there to see that everything was safe and clear?

A. A man could always get a signal to stop—that indicates that everything is not clear.

Q. —We will find out what it indicates. Have you discussed that phase of the case with anybody since your testimony was given this morning?

A. No sir.

Q. Well, how is it that you have changed your testimony since the testimony that you gave this morning on that subject?

Mr. KEATON: Objected to as a misconstruction of the witness's testimony.

Sustained. Defendant excepts.

Q. Who were you to get this signal from?

A. Well, I generally got it from the man in charge of the work,—a man—most anybody—gave the signal; I guess the foreman told him to give the signal; I don't know anything about who gives the signal.

Q. But, Mr. Waters, you say that you stopped until you got the signal from somebody?

A. Yes sir.

Q. Now, who were you to get the signal from?

A. I suppose from the foreman, the man in charge of the work.

Q. How many times did you hold your engine for that bridge?
A. Why, I don't know; I didn't keep track of that.
Q. Who had you been getting these signals from?
A. Well, from different workmen there; at one time one man would be working there awhile and another time another man would be working there, and we got the signals from the man who put up the piers, and from the man that was putting up the bridge.
Q. You don't know who you were getting the signal from at all then?
A. I suppose from the foreman.
Q. You were just taking the signal from anyone that gave one weren't you?
76 A. We generally always got the signal to come ahead generally the foreman gave the signal.
Q. Who was the foreman there at that time?
A. Jake——
Q. Fallahay?
A. Yes, at the time the bridge went down.
Q. He was the foreman there then?
A. Yes sir.
Q. He was the man that you looked to for the signal at that time?
A. Yes sir, and Mr. Pratt.
Q. Mr. Pratt had nothing to do with the foreman on the bridge, did he?
A. Yes sir, I suppose he did; he was superintendent on the works.
Q. Superintendent of the work on that bridge?
A. Yes sir, that is what I understood.
Q. Whom did you understand that from?
A. From him.
Q. You understood from Mr. Pratt——
A. —that he was superintendent of the bridging—that is, of the whole cheese.
Q. He told you that?
A. Yes sir.
Q. Did you hear it from anybody else?
A. Why I heard it talked by several of the men; that was my understanding from what I heard out there that Mr. Pratt was superintendent.
Q. You got that from Mr. Pratt?
A. Yes.

Mr. MOSELEY: Now, if the court please, we move to exclude the evidence of this witness of Mr. Pratt being superintendent of construction because it shows that it was hearsay.
Motion denied. Defendant excepts.

Q. Don't you know that Mr. Pratt had nothing more to do with the construction of that bridge than you did?
A. I could not swear that he was superintendent, I don't know anything about that at all; I know that he had charge of putting the timbers off there and unloading stuff; I suppose that he was superintending the whole thing.

77 Q. Well, that was simply a supposition wasn't it?
A. Yes -ir, I supposed he was superintendent of bridging.
Q. He simply superintended the unloading of material?

Mr. KEATON: Objected to as incompetent; the witness has stated the facts upon which he based his opinion.
(Argument.)

Q. Now, let's see; upon what facts did you base, your supposition that he was superintendent of that bridge?
A. Because he was called superintendent and he went by that name; he was the man that hired me, and that is the man I generally go by—the man that superintended the work and the man that had authority to hire me.
Q. Now, are those all of the facts that you have in your possession upon which you based that statement?
A. Yes sir.

Mr. MOSELEY: All right. If the Court please, we ask that it be excluded.
Motion denied. Defendant excepts.

Q. Now, your train put off material for this bridge, did it?
A. Yes sir.
Q. The train that you were hauling and the train that Mr. Wilson was firing on?
A. We didn't put off material on that day; we had a freight car to unload——
Q. On this very day you had freight to unload for the people there?
A. Yes sir, the people working on the bridge.
Q. Mr. Fallaha and his crowd?
A. I suppose it was Mr. Fallaha; I just told him that I had freight to unload.
Q. You say that you do not know who this stuff was for, but that it was for the people working on the bridge?
A. I suppose it was; I know he told me that he had freight to unload there, and they didn't haul any freight for anybody only those——
78 Q. You stopped there; what was the first thing you did after you stopped?
A. Well, the first thing we done after we stopped was to see if the engine could go over after the car.
Q. Where was this car?
A. It was over about the middle ways of the river,—from the bridge—from this end of the bridge.
Q. Now that car was beyond the place where the bridge broke down?
A. Yes sir.
Q. Was it an empty car or loaded?
A. It was a loaded car.
Q. What was it loaded with?
A. Loaded with pump material.

Q. About what weight of material, in your judgment, Mr. Waters, was on that car?

Q. Well sir, I could not say; I don't have any idea of how much one of them pumps would weigh.

Q. Was it a heavy load or a light load?

A. Well, it was a medium load.

Q. Now that is the car that is shown here upon these pictures, is it?

A. Yes sir.

Q. Exhibit A. and B.?

A. Yes sir.

Q. Do you know how that car got out on the bridge?

A. No sir, that car was there when I got there.

Q. Did you come into town the day before; did you drop off an empty car at that point?

A. No sir.

Q. Sure of that?

A. I am sure of that.

Q. Was there an empty car there when you passed?

A. Yes sir, there was an empty car there as I passed.

Q. A flat car?

A. Yes sir.

Q. You didn't pass it out on the bridge, did you?

A. No sir. There was a little side track there at the end of the bridge.

79 Q. On which side?

A. This side.

Q. The Oklahoma City side?

A. Yes sir.

Q. And when you got there the next day it was out on the bridge?

A. Yes sir.

Q. You say you started out after it?

A. Yes sir.

Q. On the engine?

A. Yes sir.

Q. Is it not a fact Mr. Waters, that, before you did that, you hitched on to a derrick car out there on the side track and started to push the derrick car in front of the engine across the bridge?

A. No, sir, no sir.

Q. Did not Mr. Fallaha tell you that he wanted to get some water in the cylinders or cistern of the derrick car, and that he wanted that carried out on the bridge there somewhere ahead and filled with water?

A. No sir, I don't remember anything about that.

Q. And is it not a fact that, in pushing this derrick car over ahead of your engine, one of the bents sunk slightly?

A. No sir, I didn't have any derrick car: I was going over with a light engine, after this car, and I backed off of it.

Q. Your recollection is that you started over with the engine after the car out on the bridge?

A. No recollection about it; I know I went over and started for

the car, and the bridge started to fall, and I backed off of it before she did fall.

Q. Well, what was done then?

A. All I know is that the timbers gave way under the bridge,—I am not a bridge builder——

Q. The timbers gave way?

A. Yes sir.

Q. And what was done with it?

A. Why we taken a rope and fixed it to the bridge and to the engine—the other end—and pulled it back in place.

Q. Who do you mean by "we"?

80 A. Well, the engineer and fireman, and the foreman and the men; they put a couple of ropes on the piles and pulled it back.

Q. Did you work on it together?

A. Yes sir.

Q. And then what did you do, after you pulled it back in place?

A. We waited there quite a while and then we went over after the car.

Q. Who went over after it?

A. Myself and the conductor, and fireman and Mr. Fallaha went along in the engine.

Q. And you hitched on to the car?

A. Yes sir.

Q. What did you do with it?

A. We pulled it back over the river with us.

Q. You hitched it on and brought it over to the Oklahoma City side?

A. Yes sir.

Q. What did you do then?

A. Coupled on to the train.

Q. And then what did you do?

A. Coupled on to the train and got the order, and the conductor says to me "Pull down and we will unload our freight, and we will be ready to go."

Q. And then you started over?

A. Yes sir.

Q. And fell in the river?

A. Yes sir.

Q. Is that all that occurred there?

A. Yes, that is all that occurred there, except that some of us tried to get out of the water after the engine went down with the bridge.

Q. You stated this morning that somebody told you that is was safe to go ahead?

A. I got the signal from Mr. Pratt and Mr. Fallaha also told me; we walked out on the bridge and he told me it was safe—it was all right; I didn't want to take any chances on my life.

Q. That was just before you started?

81 A. It was just before we started after the car, after we fixed the bridge up, we came back and then started over, and fell in.

Q. You went out on the bridge, you say?

A. Yes sir.

Q. Mr. Wilson was with you?

A. No sir, him and the conductor was sitting out there in the shade of the car—in the shade of this flat car that you see in the picture.

Q. And you walked out on the bridge, did you?

A. Yes sir.

Q. And examined it?

A. I looked at the bridge, and asked them also if they thought it was safe, and then said yes it was safe.

Q. How far over did you walk?

A. I just walked out on the bridge a little ways—didn't go a great distance.

Q. How far was Mr. Wilson sitting from the bridge?

A. About three car-lengths, something like that.

Q. What condition was the water in?

A. Do you mean up or down?

Q. Up or down, yes?

A. It was up quite a bit; the river was rising.

Q. Was it pretty high then?

A. Yes sir, it was pretty high.

Q. It was very high, wasn't it?

A. Yes sir, it was very high, it had been.

Q. Now Mr. *Wilson,* is it not customary on trains of that kind, when crossing bridges about which you have any doubt at all, for the engineer or fireman to go ahead of the engine on to the other side of the bridge, and for the other man to start the engine and step off and catch on to the tail end of the train and motion for the other man——

A. I have heard of such as that, but we never practice it here; at least I never did.

Q. You never did that?

A. No sir.

82 Q. Don't you know that it was habitually done?

A. I have heard of it being done, yes, right on this work. I never done it though; I know of a case of that kind.

Q. Is it not perfectly practicable to do that?

A. No sir, I don't think it is.

Q. Why?

A. Because, I think, if a bridge is safe and trains are going over it every day, one man is not much better than another in taking chances of that kind.

Q. Well, I say, is it not perfectly practicable to do that?

A. No sir it is not.

Q. Why is it not?

A. Because a man don't know that a bridge is unsafe, if he takes through freight over it; the superintendent of the bridge ought to know——

Q. —answer the question: Is it perfectly practicable for an engineer to go ahead over that bridge and to catch the engine when it

comes over on the other side, and for the man who starts it to get on at the rear end?

A. No sir, it is not practicable; it has been done.

Q. Why not practicable then?

A. Because I don't think it is railroading.

Q. Is that the only reason that you do not think it is practicable, because it is not railroading?

A. Yes sir, it is not railroading.

Q. Well, you were building a railroad, were you not?

A. Well, we were on a railroad that was b-ing built; I was getting orders to run trains, and we call that railroading.

Q. You could get on an engine running at that rate of speed surely?

A. Yes sir.

Q. And without danger?

A. Yes sir.

Q. And could not the man that was left, start the engine and leave it to run at that rate of speed across the bridge?

A. Yes sir.

83 Q. And could not he catch the tail end of the train without danger?

A. Yes sir.

Q. Then why was it not perfectly practicable to do that?

A. Because I never saw it done; I have heard of its being done; I thought the bridge was safe.

Q. Now is it not a fact that on that occasion you told Mr. Wilson that if he was afraid of the bridge, he could do that very thing?

A. No sir, I did not; I told Mr. Wilson that if he was afraid of the bridge he could get off and come over after we got over the bridge; I did not tell him to get off and start the engine.

Q. You told Mr. Wilson that if he was afraid he could get off the engine and walk over?

A. Yes sir.

Q. Follow the train over?

A. Yes sir.

Q. And that you would wait for him on the other side?

A. No sir, I told him he could catch the hind end of the train.

Q. In other words, you were going to pull the engine over?

A. Yes.

Q. And after you had pulled a certain distance over it would be stopped to unload the freight, which was on the hind end of the train?

A. Yes sir.

Q. The part of the train with the freight on it had to be pulled up to about the position that the engine was in?

A. Yes sir.

Q. And then he could get on the hind end of the train when you stopped the train to take off the freight?

A. Yes sir.

Q. Well, he declined to accept your offer, did he?

A. No sir, he didn't say anything about it; he never made me any reply to it.

Q. And he did not do it?

A. No sir, he didn't make any reply.

Q. Now, you had an opportunity to observe the bridge when you went over after the flat car, did you not?

84 A. Well, I had an opportunity to see whether it would fall or not, yes sir.

Q. The bridge extended on each side of the track?

A. Yes.

Q. Is it not a fact that the top of that bridge was thirty eight feet wide, or something like that?

A. Something like that; I don't know just how wide it was.

Q. You knew that when you all went over after that flat car—you watched the bridge, didn't you?

A. Yes sir.

Q. You and Mr. Wilson both?

A. I don't know what Mr. Wilson did. I watched it; I don't know what he did; I was watching it and Mr. Fallaha was going along slow watching the bridge himself, to see whether it was safe or not. I was watching him all the time.

Q. Now Mr. Waters, you do not mean to tell us that you were there and just did not exercise your own judgment at all with reference to whether or not that bridge was safe or unsafe, do you?

A. I thought the bridge was safe from what they told me there about the bridge; I thought the bridge was all right; I had been taking their advise for a month. They had fixed it up and straightened it out.

Q. You had looked on the water for a month from the bridge, hadn't you?

A. Yes sir.

Q. And don't you know that they could not do anything more than that?

A. I didn't know anything about it; I didn't know whether they could have done anything more or not.

Q. You knew that they didn't do any more on the bridge then?

A. Not that I know of; they said it was safe.

Q. You were right there with them?

A. Yes sir.

Q. And you knew that they did not do anything more than just what you did,—look at the water and look at the bridge?

A. —Who did?

Q. Mr. Fallala and Mr. Pratt?

A. Why he was there helping to fix the bridge; he was the foreman of the bridge, working the men.

85 Q. Well, as to their opinion that the bridge was safe,—they did not do any more than you did, did they?

A. I don't know whether they did or not; they told me that the bridge was safe.

Q. —answer the question. Do not you know that they did not

do any more than you did in making up their mind than you did in making up yours?

A. No sir, I don't know anything about it at all; I suppose- that it was all right.

Q. You were with them and you saw what they did?

A. Yes, I saw the water under the bridge.

Q. You saw what Fallaha and Pratt did, both of them, didn't you?

A. No sir, not all the time I didn't.

Q. What time was it that you didn't see what they did?

A. Several times; I wasn't working on the bridge all the time; I was on the engine part of the time.

Q. What do you suppose they did more than look at the water and the bridge?

A. I knew they was fixing the bridge.

Q. Well, you helped do that?

A. No sir, all that I did of it was to pull it back in place with the engine; I wasn't working on the bridge.

Q. Well, that was just one bent wasn't it?

A. Well, there was two bents——

Q. —You don't mean sprung out of line——

A. —Sprung out of line,—well, started down—kind of sunk.

Q. Do you know which bents they were?

A. No sir, I don't.

W. N. WILSON, the plaintiff, is the next witness called to the stand, and gives the following testimony in his own behalf:—

By Mr. KEATON:

86 Q. You are the plaintiff in this case Mr. Wilson?

A. Yes sir.

Q. What is your business Mr. Wilson,—or was your business?

A. I was a locomotive fireman at the time I got hurt,—been in the business for quite a while.

Q. When did you get hurt?

A. On the 9th day of June in the morning.

Q. What year?

A. 1902.

Q. In whose employ were you at that time?

A. In Mr. McCabe's and Mr. Steen's.

Q. Do you mean McCabe and Steen or the McCabe & Steen Construction Company?

A. The McCabe & Steen Construction Co.

Mr. SNYDER: Objected to as leading, suggestive and incompetent. Objection overruled. Defendant excepts.

Q. Who employed you?

A. Mr. J. Pratt.

Q. Who was he?

A. He was the superintendent.

Q. When did you accept that employment, or when were you employed Mr. Wilson?

A. I think it was right about the 1st of April; I am not sure as to the date.

Q. In what capacity were you employed?

A. As a locomotive fireman.

Q. Are you acquainted with Mr. Waters?

A. Yes sir.

Q. How long had you been acquainted with him prior to the accident?

A. Just about a month, about 30 days I think.

Q. How far was this road built at the time that you first commenced working on it?

A. It was built to Mustang; I think it is about 14 miles to Mustang—maybe fifteen.

Q. How far was it built at the time of the accident?

A. About 34 miles; we call it 40 miles to Chickasha.

Q. Who was with you on your train that morning when you arrived at the South Canadian River?

A. Well, our crew and Mr. Pratt was on the engine when we got to the river, and there was some fellows in the caboose; I don't
87 know just who they were—some of the employés.

Q. Who did you find there on the bridge when you got there, if anybody?

A. Found Mr. Fallaha with a gang of men of about,—well, I don't know,—twenty or thirty men, I should judge.

Q. What were they doing?

A. They were working on the bridge.

Q. Who is Fallaha?

A. He was their foreman; he was the foreman doing the bridge work at that time; he worked at different places out at what is called the material yards, but he was out on the river on this bridge at this time with a gang of men.

Q. Now when you first arrived at the bridge—the north side of it, what did you do?

A. We stopped there and cut off our engine from our train and intended to go over and pick up a car that was loaded and shoved out on the bridge,—I will say about 100 yeards or may be more than 100 yards from this bank this way; we intended to pick up that car.

Q. Well, what did you do?

A. Well, when we started out over the river, just after we cut off our engine, we started for this car, and just as we got out on the bridge why, the bridge started to go down,—sink down, and the engineer backed the engine off the bridge, to the bank.

Q. And then how long did you remain there?

A. We was there,—well, I would say from 45 minutes to an hour; I could not say just exactly; it might have been a little bit longer than that.

Q. What were those bridge men doing while you were there?

A. Well, after we had started down, we backed up and got off the engine and went over there and looked at it, and they got a couple of ropes—I don't remember just what it was—and fastened them

to the bridge somewhere and coupled on to our engine,—the
88 front part of our engine, and told us they wanted to make a slow pull on this bridge, and we went back and got on the engine and we made the pull to brace it and straighted it back.

Q. Well, what were they doing after that?

A. Well, they went to working on the bridge, all this crew.

Q. Where were they with reference to the bridge, on top of it or underneath it?

A. There was some of them on top and some of them underneath; more of them were underneath the bridge I think.

Q. Where were Fallaha and Pratt?

A. Well, they were everywhere; they were on top of the bridge and underneath the bridge and everywhere else,—both of them.

Q. Then how did you happen to go back on the bridge, if you did go back any more?

A. After they got it fixed up, why they said it was all right——

Q. —Who said that?

A. Mr. Pratt and Mr. Fallaha.

Q. Then what did you do?

A. We went over after this car that we wanted to pick up at first.

Q. Did you hear Mr. Pratt or Mr. Fallaha either one or both, say that it was all right before you started over after that car?

A. No, not when we started over the first time; I don't remember; they said something but I could not understand just what it was.

Q. Well, when you went over to get the car?

A. No, that was the time we was standing there talking, after they got it fixed, and they said something; I didn't quite understand what it was, and we started back to the engine, and when we were getting on the engine I asked——

Mr. SNYDER: We object to that as hearsay.

Q. Where had the engineer been during that time?

A. He had been out on the bridge.

Q. Had you been out on the bridge?

89 A. I never went out on the bridge at all, but I went kind of under the bridge and rested on the dump a little right after it started to go down the first time.

Q. Now, when you went back to get on your engine, did the engineer make any statement as to what Fallaha and Pratt had said?

Mr. SNYDER: Objected to as incompetent and hearsay.
Overruled. Exception.

A. Well, I asked the engineer what they said. I says "Doc (?), do you think it is all right,"—we called him Doc—"do you think the bridge is all right?" and he said "Mr. Pratt and Mr. Fallaha says the bridge is perfectly safe?"

Q. Then where did you go?

A. We went over after our car.

Q. When you went over there what did you do?

A. Coupled on to this car, and we stayed there,—Oh about 20 or

25 minutes, probably not quite so long,—maybe no more than 15 minutes.

Q. Why did you stay there?

A. Well, we was waiting for the signal to back up.

Q. Did you get the signal?

A. Yes sir.

Q. From whom?

A. From our conductor and Mr. Fallaha both.

Q. Where was your conductor?

A. He was back on the bridge; after we stopped there and coupled on to this car, he walked back on the bridge again—back to where they were.

Q. Then what did you do when you got those signals?

A. We backed over across the river again, and coupled on to our train with this car ahead of us.

Q. How long did you remain there, if at all?

A. We were there about—Oh about 40 minutes, I guess. Thirty or forty minutes, I could not say positively.

90 Q. And then what occurred?

A. Then we started to go ahead. The conductor and myself were sitting in the shade of this car on a piece of lumber, and we was sitting there talking, and Mr. Fallaha and Mr. Pratt they were both out on the bridge, and we were sitting there waiting until they got ready to holler "All right come ahead," and give the signal, like that (indic.).

Q. And when they did that what did you do?

A. I went right back and got on the engine and we started.

Q. Where did the conductor go?

A. He got on this car ahead of us, this car of machinery; it was an upright pump for a water tank—is what it was.

Q. Well, then what happened when you started?

A. We got out over the main current of the river, and I was down,—just as we started I got down and started to put in a fire; my fire had got pretty low and we had a heavy train and I got down there and was putting in a good fire, because we had a hill after we left there, and just as we pulled over about the main current of water the bridge started to go down, and it just sank right down under me,—I was standing in the cab and it sank right down under me and I got caught in here (indic.) and got carried down with it.

Q. And where did you go with it?

A. I went down until we struck the bottom and I was still fast, and I finally got loose and tried to swim away, and when I got loose I was inside the cab and the water was up in my face, nearly to the top of the cab window, and I went out of it; after I got loose I went out through the cab window on my side,—the back part of the window, and I got outside, and there was timbers and everything, and they put me under the water some way, and when I came out of the water I seen my leg was broken and the wind was mashed out of me and I could not get my breath hardly, and I thought I was going to drown, and I hollered "Help" to them, and Mr.

91 Pratt threw in a rope, I don't think it got closer than 40 or 50 feet to me——

Q. Well, how far down did you go?

A. Well, I went on swimming and floating in the water the best I could, and I went down the river a ways and went under again, and when I came up that time I was nearly drowned, but I had made my way towards the bank considerably from where I went in, and I was headed towards some drift, and I was afraid that if I struck that drift the water would suck me under it, I was so weak, and I hollered out to them not to let me go under that drift, that it would suck me under, and when I did that a fellow grabbed a piece of lumber and ran in as far as he could and shoved the lumber out to me, and I got hold of the end of it——

Q. —Who did that, if you know?

A. I know, but I can't call his name just now; he was the time keeper for this concrete outfit; I can't call his name just now, I know him too.

Q. Well, when you got out what was done with you then, if you know?

A. Well, when they pulled this piece of lumber up to the bank with me on it, why there was four or five or half a dozen there, I don't know how many there was there that got hold of me and pulled me out of the water, and they had a stretcher there to put me on, and they carried me on back up to the track and put me in the caboose, and there was another train following and they put me on it and brought me to St. Anthony's Hospital in this city.

Q. Now you said you were caught in here?

A. Yes sir.

Q. Do you know when your leg was broken?

A. I do not; the first that I noticed of my leg being broke— well the first time I wanted to use it right well was when I got out in the water and wanted to swim. I was caught between the tank and the cab; the tank first struck me right in the back there—it struck me right in the small of the back there and shoved me up again- the cab; the engine being the heaviest it went down the fastest and
92 I guess the tank kind of stood in this shape; that is how it came to punch me so quick, I guess.

Q. Well, you may state when, if at all, you felt any pain from any of these injuries?

A. Well, I felt it right then, just as quick as I was mashed, and as quick as the engine started down I was mashed.

Q. When did you next notice it, if at all, after you got out of the cab?

A. Well, just as quick as I came up from under the water I seen my leg was broken all to pieces and of course it was paining me.

Q. You were suffering?

A. Well, it seemed like there was a lot of knives run through me leg in every way; here on the knee and here at the hip both. Like a lot of knives sticking in at different places.

Q. What use did you have of it, if any?

A. I didn't have any.

Q. Now when you got out you say you were put on that stretcher and put on the caboose?

A. Yes sir.

Q. State whether or not you were suffering any pain then and if so from what injuries?

A. Yes, I was suffering all the time; it seemed something was hurting me and I could not hardly get my breath, and I was,—well, I was in misery all over.

Q. State whether or not you spit up anything?

A. Yes, I spit up blood. Blood was all over the side of the caboose,—all over the side—blood and bloody looking stuff.

Q. What caboose was that, the one that you had——

A. Yes sir, our caboose, the one on our train.

Q. How long did you continue to spit up blood?

A. Well, I spit up blood—I spit up blood off and on all the time I was in the hispital, and have lots of time since then; I spit
93 up blood every two or three days since I have been in Oklahoma this time.

Q. How long were you in the hospital Mr. Wilson?

A. I was in the hospital two months and two days.

Q. Who treated you?

A. Dr. Rollater and Dr. Howard.

Q. Now when you left the hospital in what condition were you with reference to being able to walk on that limb?

A. I was not able to put any weight on it then, that is, none to amount to anything at all. The doctor told me only to bear a little weight on it,—but a very little, and then gradually a little more all the time.

Q. How long did you use crutches, if at all, after you left the hospital?

A. I used crutches two months and I used a cane about two months after that.

Q. What was the condition of your health Mr. Wilson at and just prior to the time of this injury?

A. I was in the very best of health—everything well.

Q. What had been the condition of your health through all your life, practically, prior to that?

A. I never was sick in all my life until they took me to the hospital, that I remember of at all—that is since I was old enough to remember anything.

Q. What was your weight?

A. I weighed a hundred and fifty-five pounds.

Q. Prior to that. What is your weight now?

A. About 141 or 2 pounds.

Q. How long did you remain here in Oklahoma City, after the injury?

A. After I got out of the hospital I went home to south east Missouri, and stayed 30 days, and then I came back here and
94 stayed awhile; went up to Joplin and visited awhile there, and came back down here and about the 20th of December I left here for southeast Missouri again.

Q. ——The 20th of December a year ago?

A. Yes sir.

Q. ——Last December?

A. Last December. About the 20th I think it was.

Q. What was your business, and how long had you been engaged in that business prior to the receiving of this injury?

A. I had been working for Mr. McCabe and Steen, I think about two months only.

Q. Well, but what had been your business?

A. Well, I had been in the engine department as a fireman and engineer for about six years,—well, five years I guess, between five and six years.

Q. In what capacities did you work on an engine?

A. I worked as fireman on a freight and passenger engines, and had quite a good deal of experience as an engineer before I came here.

Q. On what roads did you work?

A. On the Frisco.

Q. Altogether?

A. Yes sir.

Q. All the time?

A. ——Kansas division, out of Joplin and Monette.

Q. Are you a single man or married?

A. I am single.

Q. What is your age?

A. 32 years.

Q. What wages were you able to earn as a fireman, and were you earning at the time of the injury?

A. Well, I think the job out here paid between 65 and 75 dollars, out here; but then of course I didn't get quite standard pay out here.

Q. What had you been earning?

A. The jobs I had been on,—I fired on a passenger run for two years, the last firing I done; it paid me $75.00 and $85. $85.00 nearly all the time I guess.

Q. Now, with reference to your condition of health; you may state whether or not you had ever spit up blood prior to the time of
95 this injury?

A. Never did.

Q. Never had any lung trouble or chest trouble of any kind?

A. No sir, never did.

Q. What has been your physical condition generally,—just describe to the jury,—since the receipt of this injury,—or rather since you got out of the hospital?

A. Well, my leg has been weak at the joint, and at the hip where it was broke, in both places,—were weak. I am weak across the hips—my back here; and I just feel broken down all over; I haven't been able to do anything scarcely at all.

Q. Have you taken any employment anywhere since then?

A. Yes sir, I have worked about a month and a half or two months since that over in Missouri.

Q. Where?

A. At Grandia, Missouri.

Q. At what?

A. In a planing mill.

Q. How much did you earn while you were working there?

A. I was tying flooring and ceiling behind the flooring and ceiling machine—tying the strings.

Q. Now, if you quit that work, you may state why?

A. I was sick, I wasn't able to work. My leg played out on me, when I would stand on it all day; it was so weak; it played out on me. When I would go home at night and sit down for supper—or at my boarding house rather—sit down long enough to eat a meal, and get up, my leg would be so sore where it was broke in the knee and the joint—that I could scarcely stand on it. If I sat down that long it seemed to get stiff and sore,—whenever I stopped walking on it.

Q. You may state whether or not a job of fireman and engineer requires one to be on his feet, or otherwise, a good portion of the time?

A. Yes, it does; a fellow that is firing an engine has got to be on his feet, and in motion with his knees and his hips all the time.

96 A. One must reach here and pick up their coal and throw it there. It keeps you in operation all the time,—your knees and hips.

Q. How much have you been able to earn altogether since this injury?

A. I drew $30 above my board for that month and a half or two months, and the rest of the time I was at home; I didn't pay any board and didn't work any.

Q. What was your home?

A. At my father's.

Q. Mr. Wilson, you may state whether or not you had ever had any experience prior to this accident with reference to the construction of railroad bridges or any other kind of bridges?

A. Do you mean, had I ever worked with a construction company?

Q. Yes, or knew anything about the mechanical work of constructing bridges?

A. No sir, these were the first construction people that I ever worked for.

Q. Well, were your duties on this work such as to advise you about building bridges?

Mr. MOSELY: Objected to as incompetent.

Sustained.

Q. What, if any, experience did you have while you were working for McCabe & Steen, about building bridges?

A. I didn't know anything about it at all; it was out of my line of business.

Q. You may state whether or not you would have gone across on that engine, either after this car or to take the train across, but for the information given you by Mr. Waters, that the foreman of the bridge gang and the superintendent had said that it was safe, and for the signals that they had given you?

Mr. MOSELY: Objected to as leading, suggestive and incompetent, irrelevant and immaterial.

Overruled. Exception.

A. No sir.

4 P. M. Ten minutes' recess.

Q. Mr. Wilson, you may state whether or not these injuries, or either of them, are painful at the present time, and, if so, to what extent, and how frequently?

97 A. They bother me more or less all the time; sometimes for a week at a time, they bother me every day, and sometimes they don't bother me for a day or two.

Q. Where is the pain?

A. Right in my knee and in the hip joint; they bother me more or less all the time.

Mr. KEATON: That is all.

Cross-examination.

By Mr. MOSELEY:

Q. What date did you leave here, you say, Mr. Wilson?

A. Do you mean the last time I left here?

Q. Yes?

A. I left here the 20th of December, I think it was,—the 20th—pretty sure it was.

Q. The 20th of December, 1902?

A. Yes sir.

Q. Now, when did you do this work that you refer to in the sawmill?

A. It was in July and August, 1903.

Q. I believe you said that you had been working for McCabe & Steen about two month before this accident?

A. Yes, about two months.

Q. What were you doing during that time?

A. Firing this engine on the Oklahoma City & Western.

Q. And what was the train doing?

A. We were hauling material to the front pretty well all the time.

Q. Wherever it was needed?

A. Well, we was doing all of our hauling to the front pretty near all the time,—hardly ever hauled anything anywhere else any more than a little stuff throwed off here and there; we hauled ties and steel pretty near all the time.

Q. Now the road was not completed; that is to say, the section houses, and the water tanks and so forth,—was not completed along the whole road, was it, two months before you were hurt?

98 A. I don't think the road was built two months before I was hurt, very far; it was only built to Mustang when I commenced there. A. About 14 or 15 miles from here.

Q. This side of the river or the other side?

A. The other side.

Q. When you went to work the road had not even crossed the Canadian River?

A. No sir.

Q. Well, did you haul any of the material for this bridge?

A. No sir, the bridge had already been built.

Q. And you were hauling material largely for the track?

A. Yes sir.

Q. And for the depots and stuff of that sort; the depots had not been built ahead of the track along, had they?

A. No sir, they were building the depot at Mustang; that delivery was completed when I got hurt, but they were building it; and they had a section house to build at Wheatland—I think that is the name of the station; it is the first station out here.

Mr. MOSELEY: That is all.

R. M. HOWARD, (Dr.) was the next witness called to the stand by the plaintiff, and gave the following testimony under oath:

By Mr. KEATON:

Q. Mr. Howard, you are a physician and surgeon?

A. Yes sir.

Q. Where do you live?

A. In Oklahoma City.

Q. Are you acquainted with Mr. Wilson, the plaintiff in this case?

A. I am.

Q. When did you become acquainted with him, Doctor?

A. On the 9th day of June, 1902.

Q. A year ago last June?

A. Yes sir.

Q. Where did you see him?

A. At the hospital, St. Anthony's Hospital.

Q. Do you know how long he had been there when you saw him first?

A. Why I was at the hospital when they brought him in.

Q. Did you observe any injuries on him?

A. Yes sir.

99 Q. Locate them?

A. —Very shortly afterwards Dr. Rollater and myself made a examination and found that Mr. Wilson had an intercapsular fracture of the femur.

Q. That is up here at the neck of the femur bone?

A. Yes sir. And also an intercondeloid fracture of the lower end of the femur, just above the knee——

Q. What do you mean by that intercondeloid fracture?

A. A fracture across the bone just above the knee, in splitting down between the two condyles at the lower end of the femur.

Q. Did you find any bruises on him?

A. Some bruises on the pelvis; also some bruises on the thigh.

Q. Between the two fractures?

A. Yes sir.

Q. Was that fracture of the neck of the femur a serious fracture?
A. Commonly considered so, yes sir.
Q. How about the other one you found?
A. The other we might say, would be not so serious, but it was a serious fracture.
Q. Did you find any bruises about the lower part of his abdomen?

Mr. MOSELEY: Objected to as leading; let him state what he found.
The COURT: All right, state all the injuries you found.

A. There was—I don't know—externally,—I don't know whether there was any bruises across the abdomen or not, but from the symptoms that developed there must have been considerable contusion of the abdomen.
Q. What symptoms were those?
A. He had considerable pain in the abdomen, and he had considerable trouble with his pulse for several days.
Q. About how long?
A. As I remember, it was for as long as three days.
Q. How long was he under your care, you and Dr. Rollater?
A. I think he was at the hospital until about the 11th of August.
Q. Who were you employed by?
100 A. I was assisting Dr. Rollater; he was employed by McCabe & Steen.
Q. You were with Dr. Rollater at that time?
A. I was.
Q. Associated with him?
A. Yes sir.
Q. Have you ever examined that limb since?
A. Why a few days ago Mr. Wilson was in my office and I examined him superficially just from the interest I had in his having been under my care, but I didn't make a close examination of the limb at that time.
Q. What, if anything, did you find Doctor, as evidence of these injuries?
A. Well, there is probably nine inches above the knee, on the outer side of the thigh, there is a slight depression, and there seemed to be some—the lower end of the femur seemed to be a little thicker than it normally should——
Q. How about the length of the limb?
A. Well, at that time, I think the limb was a little short, but my examination was only superficial and I would not bank much on that statement.
Q. What, in your judgment, was the condition of those two injuries with reference to being of a permanent character or otherwise?
Q. Well, in my judgment, there has been a complete recovery from the injury.
Q. As much as it was possible?
A. As much as it was possible to be, yes sir.
Q. In your experience, would that probably be painful now in the joint there or not, can you tell?

Mr. SNYDER: Objected to as suggestive and leading.
Overruled. Defendant excepts.

A. Well, I can't say as to whether they are painful or not; those hurts sometimes are.

Mr. KEATON: That is all.

Cross-examination.

By Mr. SNYDER:

101 Q. Doctor, how long have you been practicing medicine?
A. Since June 1901.
Q. Are you a graduate of any school?
A. Yes sir, the University of Michigan.
Q. How long have you been practicing in Oklahoma?
A. Since July 17th, 1901.
Q. What experience, limited or otherwise, have you had in treating such fractures as you found on the person of Mr. Wilson?
A. My experience is very limited.
Q. You were called in to assist Dr. Rollater in this particular transaction?
A. I was.
Q. Were you employed by McCabe & Steen or simply called in by Dr. Rollater?
A. I was called in by Dr. Rollater.
Q. Were you working with him as a partner, or working for him?
A. Working with him.
Q. When did you begin?
A. About the 9th of June, 1902, as near as I can remember it.
Q. Did you make an examination other than jointly with Dr. Rol-ater, by yourself?
A. I did not.
Q. Now you say that nine inches above the knee there is a slight depression?
A. Yes sir.
Q. You think nothing serious or permanent?
A. No sir, I think not; it is not serious; it might be permanent.
Q. You say the lower end of the femur, it is probably a little deeper than it would be normally?
A. Yes sir.
Q. Is that serious?
A. No sir, I would not consider it so.
Q. You physicians do not know whether a patient suffers from a fracture of that kind, but are guided solely by what they tell you?
A. Do you mean at the time, or after recovery?
102 Q. After, say, five or six months?
A. Why we are compelled to take their word for it.
Q. Ordinarily there is not much suffering, in a case of that kind, is there?
A. Ordinarily, in a complete recovery, there is not.
Q. And you say that in this case there is a complete recovery?

A. As near as it is possible to be, yes sir.
Q. You are not telling this jury that there is any shortening of this limb, the left one, the injured one, positively?
A. No sir, I can't say that positively.
Q. Your examination was not close enough to permit you to determine that fact and to testify to it now, was it?
A. No sir.
Q. —in a superficial examination?
A. That is all.
Q. That is the first examination you have made of the plaintiff since his discharge from the hospital?
A. Yes sir.
Q. And the examinations that were made while you were assisting Dr. Rolater, were largely made by him assisted by you?
A. Yes.
Q. Those bruises across the pelvis, did you see any indications of them this time?
A. No sir, no indications of them.
Q. Any bruises across the thigh between the two fractures, the upper and the lower, this time?
A. Yes sir, there is evidence of a bruise there.
Q. The depression that you speak of?
A. Yes sir.
Q. That is the only indication?
A. Yes sir.
Q. In all other respects the recovery is absolute and complete in your judgment as near as it is possible to obtain such results?
A. From my examination I would say that it was, yes sir.

Mr. SNYDER: That is all.

Plaintiff rests in chief.

103 Here counsel for the defendant demurs to the evidence for the reason that it is not sufficient to constitute a cause of action or right to recovery by the plaintiff against the defendants.

The COURT: What point do you make?

Mr. MOSELEY: We demur for the reason that no negligence is shown on the part of the defendant.

Defendant presented written demurrer which is filed as an exhibit hereto marked exhibit C and is found in this case made at page 183.

Whereupon, the court, after hearing the argument of counsel for defendant and being fully advised in the premises, overrules said demurrer. To which ruling of the court the defendant excepts.

R. B. KINLOCK is the first witness called to the stand by the defense, and gives the following testimony under oath:—

By Mr. MOSELEY:

Q. What is your business Mr. Kinlock?
A. I am a bridge inspector of construction.
Q. What experience have you had in that line?

A. Well, I have had about five years as a bridge inspector.

Q. Does your line of business lead you to inspect what is called "False work"?

A. Yes sir.

Q. What is "false-work"?

A. False work is temporary work, put in to carry trains until they get ready to erect their span.

Q. Have you seen the plans in accordance with which the Canadian bridge was built for the Oklahoma & Southwestern?

A. Yes sir.

Q. What can you say about those plans, are they good or bad?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Defendant excepts.

104 Q. Are they sufficient or insufficient?

Same objection. Sustained. Defendant excepts.

Q. Mr. Kinlock, in sinking piles, please state whether or not 18 feet penetration in soil is sufficient for security?

A. Yes sir, 18 feet is plenty.

Q. What is the usual penetration in work of that kind?

A. Well, it is very seldom that it is more than 18 feet; usually from ten to twelve feet.

Q. A bridge constructed with, say 12 inch piles, oak piles, at the large end, with 18 feet penetration, and eight feet high, above the soil, five piles to the bent, bents 16 feet from centre to centre, with caps twelve by twelve, twenty eight feet long, which were tied together longitudinally by stringers 7 by 15, sixteen feet long, abutting in *in* the centre of each pile cap, and rivited with a spike ⅜ of an inch in diameter, would such a structure constitute a secure system of pile-bents for a bridge?

Mr. KEATON: Wait. We object unless counsel expects to show that that will be his case——?

MOSELEY: —why, certainly——

The COURT: Why, don't you show how the bridge was constructed?

Q. Were you out there——

A. —No.

Mr. SNYDER: We will establish the facts upon which that hypothesis is based.

The COURT: All right. Objection overruled.

Plaintiff excepts.

The COURT: The question is, would that be a safe construction?

A. Yes sir, that certainly would be so considered.

Q. The drift bolts were ¾ by 18 inches, would that be secure?

A. Yes sir, that is what is usually used.

Q. Now, you say that would be secure; you may state whether or not such a structure is as good or poorer, or whether it is similar or dissimilar to structures ordinarily in use in this country of that character?

105 Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Plaintiff excepts.

The COURT: Is that construction similar to those used in this country?

A. Yes sir, that is the standard on pretty near all roads.

Q. Now, Mr. Kinlock, in the construction of pony bents upon the caps of the pile bents; there were erected pony bents, erected by four logs, 12 by 12 with a cap, 11 feet, of course erected in the centre of the caps of the pile bents, which, when so erected, were fastened by braces, 3 by ten inches, one across from the pile bent to the cap of the pony bent, running diagonally, and then one on the other side of the pony bent opposite, running diagonally in an opposite direction, and then, opposite each crossing of these cross-pieces, with the cap of the pony bent, and logs of the pony bent, and down to the cap of the pile-bent, cleats or scabs put opposite, which were fastened there by bolts—(I believe these bolts were ¾ bolts)—¾ bolts, two bolts through the pony bent and one through the log immediately under that part of the pony bent, and the same thing being through the pile bent and the log going up through the pile bent, and a bolt through the pile-bent, at each place; please state whether or not that would be a sufficiently secure fastening for the pony bent upon the pile-bent?

A. Yes sir, that would be quite sufficient; those cleats are an additional security, that is not usually used; those braces that you speak of are what they generally use, without the scabs (or cleats).

Q. What do they call those braces?

A. They are sway braces.

Q. There would be one on each side?

A. One on either side.

Q. With the scabs opposite and crossing?

A. Yes sir.

Q. Now, is such construction usual or unusual in this country?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

106 A. It is usual, yes sir.

Q. And the places on top,—the cap of the pony bent, that is 12 by 12; what do you say about that size?

A. That is the size that is usually used.

Q. Now, take pony bents that are connected on each side by three stringers 7 by 15 inches with cushions between them, three inches in thickness, so that the shoulders would drop down below level to the cap of the pony bent, those stringers bolted together so as, to make what is termed a "cord" and extending from the centre of one pony bent to the centre of the other, and a cord on each side throughout the length of the bridge; what would you say about that with reference to security or insecurity of the longitudinal braces?

A. Well sir, that is secure, as much so as it could be made with timber.

Q. Upon that place the cross ties——

(At this juncture, the Court receives a report from the grand jury.)

Q. Now, take such a bridge as that, with the cross ties and the rails placed upon it properly, would such a bridge in your judgment constitute a safe structure?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Plaintiff excepts.

A. Yes sir, it would certainly be safe.

Q. Now, is there anything Mr. Kinlock which you, as an engineer or inspector of false-work, would advise or require to be added to such a structure as I have described, in the interest of security?

Same objection. Objection sustained. Defendant excepts.

Q. Is there anything that you know of that could be properly added in the way of security to the bridge, such a bridge as I have described,—that is left off of the description that I have given you?

A. No sir, nothing that could be added to it that I see.

Q. Please state what the traveler (?) run and camber (?) run, what are they?

107 A. The traveler run is stringers put on the upper end of these caps for the iron bridge work, for them to use for the erection of the span.

Q. Did that properly and usually belong to the bridge of the false-work construction, proper, or did it belong to the iron-work structure proper?

A. That belonged entirely to the iron-work, that didn't belong to the false-work or trestle-work at all.

Q. Is it usual for the persons erecting the false-work to add those parts, the traveler run and the camber run, or is it usual for those who are to construct the iron bridge to add those parts?

A. Well, it is usual for the party that puts the false-work up to put them on, but if they run short of that class of material they leave them off; sometimes they are kept off for months; very often they are not put on until the iron bridge man comes——

Q. They are used exclusively for the iron bridge?

A. Yes.

Q. Mr. Kinlock, I did not ask you, I beli-ve, what experience you had had in work of this kind?

A. Well, I have been in the bridge service for 30 years; I have been a bridge inspector now on this class of work for five years.

Q. Where?

A. On the different parts of the Frisco, the different extensions that they have been building on the Frisco; I have been about 15 years in charge of bridge work, and about ten years working lots of hands, in a gang, on bridge work.

Q. Mr. Kinlock, in case of doubt as to the security of a structure are you able to state what kind of a test is usually adopted by workmen and railroad people to test structures of this kind?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Plaintiff excepts.

A. Yes sir, it is——

The COURT: Wait a minute——

Q. Please state what tests are usually resorted to?

Same objection. Overruled. Plaintiff excepts.

108 A. The test that has usually been used on the Frisco road has been to take a load of cars, loaded with something, and shove them across it; they usually test it that way; if the cars go over it it is regarded as safe; for safety we usually push a car over in front of the engine.

Q. A loaded flat car?

A. Well, an unloaded car, very often; if we could not get a loaded car, we take an empty car.

Q. Would the weight of 20 to 30 cars loaded be a sufficient test?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Plaintiff excepts.

A. Yes sir.

Q. That would be sufficient?

A. Yes sir.

Q. Is there any custom in this country when persons engaged—engineers, fireman—engaged in the construction work, when they come—in the progress of the work of a bridge not considered absolutely secure,—do you know of any rule or plan that is adopted with reference to train men getting over the structure without danger to themselves?

Mr. KEATON: Objected to as incompetent.

Overruled. Plaintiff excepts.

Mr. KEATON: Answer that by "yes" or "no."

A. Yes, there is a rule amongst them, the employés, it is not a rule of the company.

Q. Yes, I understand; well, what is it?

Mr. KEATON: Objected to as incompetent.

The COURT: That would not be binding on him unless it was called to his attention before the jury.

(Discussion.)

The COURT: I think the burden would be upon you to show that that custom was within his knowledge.

Objection sustained.

Defendant excepts.

Mr. MOSELEY: I believe that it all.

Cross-examination.

By Mr. KEATON:

109 Q. You were with the Frisco Railroad Mr. Kinlock?
A. Yes *sir*.

The COURT: Just a minute, we will stand adjourned until 7:30 this evening.

7:30 P. M.

Same day.
All parties present.
The above entitled cause was resumed as follows:
Same witness recalled.

Cross-examination continued.

By Mr. WELLS:

Q. Mr. Kinlock, where do you live?
A. I live at Seneca, Mo. Newton Co.
Q. You came here voluntarily to be a witness in this case, did you?
A. I have been subpænaed.
Q. Where?
A. Here.
Q. After you came here?
A. I was on my way over to Perry and was subpænaed here as I went through.
Q. You are employed now by the Frisco Railroad?
A. Yes sir.
Q. That is the railroad that is operating the line on which this bridge is located?
A. Yes sir.
Q. What is your position on that road?
A. Well, I am inspector of construction, part of it, the bridges and building.
Q. Did you have any connection with this bridge at the time of this accident in the way of inspection or otherwise?
A. No sir.
Q. That was not any part of your duty to inspect that?
A. I was not on that part of the road that was being built.
Q. What was your duty in a general way?
A. Well, to inspect the timber and to inspect the work as it is being done; see that it is done according to plans and specifications.
Q. Is that work that requires expert knowledge?
A. Well, it requires some experience.
Q. Do you inspect bridges after they are completed?
A. Yes sir.
Q. To see whether they are in condition, safe and sound?
110 A. Yes sir.
Q. Well, it is also work that requires experience and expert knowledge of the subject, is it not?

A. Well, my duties are to look over the work as it is being done—

Q. —I was not asking you what your duties were; I was asking whether it is work, this work of inspecting bridges after they are completed to see whether they are safe or not, is also work that requires expert knowledge?

A. Yes sir.

Q. It is not considered then that a man without special experience of bridge work, in looking at a bridge, could tell whether it is a safe and properly erected bridge or not?

A. Well, he should have some experience to fully understand it.

Q. Well, the opinion of a man without such experience would not be of special value would it?

A. It would not be worth as much as if he had had experience, no sir.

Q. Now, you spoke in your direct examination about the manner of testing bridges, by running cars out upon them; by whom is that kind of a test made?

A. Well, by the train men or the bridge men generally, the bridge men are as much interested in that as anyone else, if they have got any doubt at all as to the foundation; if there was deep water they could not tell always what the condition is underneath, and they use that kind of a test.

Q. Now, suppose that the bridge men had just finished repairing the bridge, and there was no doubt left in their minds as to the sufficiency of the bridge, would it be their duty to test it in that way?

A. Well, that is only done to test the foundation——

Q. —Well suppose it was below the bridge——

A. Yes sir.

Q. —It should be tested that way by the bridge men?

A. Yes,—it should be tested by the train men.

111 Q. By the train men?

A. Yes sir.

Q. Do you mean to say that the train men are the men who would determine whether it was necessary to test a bridge, and how to test it to see if it was safe?

A. No sir, not the train men, but they would make the test.

Q. How?

A. By shoving this car over.

Q. Under whose direction?

A. Well, probably the bridge foreman, or, if it was on the main part of the line, some of the officials of the road suggest it, very often they have it done.

Q. Well, the connection that the train men would have with such a test would be simply following the instructions of the train men or officials of the road who were present?

A. Yes sir.

Q. As a matter of fact, is it not a common experience in railroading, and the proper practice in railroading, that where the bridge men or the men supposed to be expert in bridges pass upon the sufficiency of a bridge, the train men accept their opinion and act upon it?

A. That is generally the case.

Q. Now, how is that test usually made?

A. Why they shove a loaded car ahead of the engine coupled on to the front end, and shove it on over, and the way that car goes over they can tell whether there is going to be any settling; that is done to test the foundation.

Q. Why do they put the car in front of the engine?

A. Well, they put it there because there would be no danger of anybody going in with it, for one thing.

Q. Then the engine is kept off of the bridge while they are making the test, is it?

A. No sir, the engine follows this car right up.

Q. And goes over the bridge with the car?

A. Yes sir, shoves the car right ahead of it.

Q. Don't they usually put a string of cars over the bridge?

112 A. No sir, not usually; sometimes they have a whole train of cars.

Q. Suppose it is a case of special danger where they are in doubt as to the sufficiency of the bridge, do not they keep the engine out of danger, so that if there is a collapse it will be safe?

A. If there is any doubt at all they shove something ahead of the engine——

Q. Well, don't they shove enough cars so as to keep the engine clear of the bridge?

A. Well, one car would do that on a trestle.

Q. It would not on a trestle as long as this bridge would it?

A. Well, those bents are only 16 feet apart——

Q. Now, in answer to a hypothetical question put by Mr. Moseley, you stated that a bridge constructed along the lines which he described, and with piling penetrating 18 feet was a safe bridge, would not that depend entirely on the circumstances surrounding the place where that bridge or piling was?

A. As long as that penetration remained it would be considered safe.

Q. In any kind of material?

A. Yes sir.

Q. Sand?

A. Yes.

Q. Quick sand?

A. Yes.

Q. Even if it did not reach the bed-rock below?

A. Yes sir.

Q. Now, you was to be understood, do you, as saying to this jury, positively that a pile bridge over a river, under which is quick-sand 18 feet, but not resting upon any solid foundation below in the way of rock or other material than the sand through which it goes, is sufficiently safe as far as foundation is concerned?

A. Yes sir; as long as that amount of sand remains there with that amount of friction on those piles, it is perfectly safe.

Q. Now, in sandy rivers, does the sand remain there in time of high water?

A. Oh no, not quick sand, it is very treacherous.

Q. Then in a river in which there is quick sand, would
113 that kind of a bridge be safe in times of high water?

A. Well, that is a question—If a scurry was started around one of those bents, it might cut it out in 30 minutes.

Q. Then, in a river in which there is a large amount of quick-sand you would not consider it safe unless there was a large amount of piling driven down to bed-rock, would you?

A. Well, we have always considered it safe with that amount of penetration, whether we got down to bed rock or not?

Q. With 18 feet?

A. Yes sir.

Q. Do you know anything about the characteristics of the South Canadian river?

A. Yes sir.

Q. That is a very treacherous river, is it not?

A. Yes sir.

Q. With a large amount of quick sand in it and other sand?

A. Yes sir.

Q. It changes it channel frequently in times of high water, does it not?

A. Yes sir.

Q. At time- washing out places 15 to 18 feet deep where there was no channels a few hours before?

A. Yes, that is the nature of the river.

Q. Now, knowing the nature of that river, you still say that you consider piling driven 18 feet into that sand, and without resting upon a foundation below, is a safe foundation for a pile bridge?

A. Yes sir, it has been considered so.

Q. Even when the water is up?

A. Well, if the water comes up and takes the sand away, that would change it; then it would not be safe.

Q. Now, taking into consideration the water being up and the fact that the water is liable to wash the sand away, and that you cannot tell while the water is up whether it has done so or not, would you consider that a safe bridge at such times?

114 A. Yes sir, I would.

Q. But still you say that the water would be likely to take the sand away and leave some of these piles without support?

A. Yes sir, but by making this test, generally you would determine whether it was safe at that time or not.

Q. Then you mean that, by making the proper tests at such a time, it could be determined whether the bridge was safe or not, and upon the test being satisfactory, it would then be safe to cross it?

A. Yes sir.

Q. You do not mean that it would be a safe bridge to cross at such a time without making the proper test?

A. A train may cross over at 12 o'clock with perfect safety, and at 12:30 a train in crossing may go through, the sand is just that treacherous if the river is rising.

Q. Then in order to make that crossing safe is it not either neces-

sary to put your piling down to bed rock or, in times of high water, test the bridge each time before a train crossed?

A. No sir.

Q. Why?

A. It is not customary to do that; we have bridged it at lots of places and we didn't put the piling down to bed rock, nor we didn't make this test.

Q. Where else did you put any bridges on the South Canadian?

A. At the Red River division.

Q. What road is that, the Frisco?

A. Yes sir.

Q. Was that a pile bridge?

A. Yes sir.

Q. It stood?

A. Yes sir, it stood all right; it was a pile foundation,—pile false work for a steel span.

Q. Steel span?

A. Yes.

A. How deep was the piling driven?

A. Well, I think they varied in depth; some of them were
115 down about 20 feet.

Q. Twenty feet?

A. Yes sir.

Q. None of them deeper than that?

A. No sir, I think 20 feet was the deepest.

Q. Was it as sandy down here as it was where this crossing is?

A. Well, I could not say about that.

Q. Do you know anything about the other pile bridges across the South Canadian River built by the railroads?

A. Well, I hav-n't had any experience at all; I have information of some of them.

Q. They all went out didn't they?

A. Well, some of them went out, at least that has been the report; I have never seen any of them.

Q. Do you know of any others that have pile bridges that have been built on the South Canadian where the piles were not driven to exceed 20 feet, that have stayed?

A. No sir, I don't.

Q. Do you know anything about the Santa Fe bridge across the South Canadian at Purcell?

A. No sir.

Q. You don't know how deep they went to get the foundation there?

A. I could not say, no sir.

Q. How do they,—in putting in a bridge of that kind—how do they go at it; do they simply prepare the plans in the office, or do they send you or anyone out to the ground, and make soundings to see what material is there and how far down it does?

A. Well, it is generally customary to make soundings, and then the plans were made——

Q. What is the sounding done for?

A. Well, to ascertain how far it is to rock.

Q. What do you want to find that out for?

A. Well, to know how much masonry it is going to take, and also to find out how far it is to rock; if it is not very far they can
116 get their piling down to rock.

Q. It is considered the better practice to send their piling down to rock, is it?

A. Yes sir, where it can be done; in some cases they cannot do it.

Q. And it is more particularly better practice to do that where the material above the rock is sand, or quick sand than if it is clay or some other substantial dirt?

A. Yes sir.

Q. Is there any way when the water is up and washing the sand away from the piling, to make soundings, so as to tell what it is doing?

A. No sir, it is not, in the Canadian; that is a very treacherous river; I don't think it would be practicable to make those soundings when the river is rising.

Q. You are not familiar with this particular bridge?

A. I never have been out to that bridge, no sir.

Q. Do you know how far they went down to put the piers when they put them in for the iron bridge that succeeded this temporary structure, at that place?

A. No sir, I don't know what the depth of those piers were.

Q. You do not know how far it is at that place down to the rock?

A. No sir.

That is all.

Redirect examination.

By Mr. MOSLEY:

Q. I believe you described what is called the difference between the false work structure, and the permanent structure, did you not?

A. Yes sir, they are both put in pretty near about the same way; they use the same class of material in them, but one is only temporary, and is only to remain there until they get another structure in there that is permanent.

Q. Now, why do engineers adopt what is known as false work?

117 A. Why it is put in that shape so as to be more convenient for the iron men to raise their span.

Q. Is there any other way to raise the iron span, in practice in this country?

A. No sir.

Q. Does what is called the false work have to be as strong as is a similar kind of bridge made for permanent use?

A. Yes, it is usually made stronger, and more material in it.

Q. Why is that?

A. Why, in addition to carrying the weight of trains it has also to carry the weight of this steel span, which, in this case, would amount to about 250 tons extra, besides the weight of the trains.

Q. Now, in expressing your judgment as to the strength and se-

curity of such a bridge as I described to you, you had that extra strain in view, did you?

A. Yes sir.

Q. The extra load it had to carry?

A. Yes, that is all calculated for.

Q. Would a three by ten, sixteen or seventeen or eighteen feet long spiked with nails, say ⅜ by 8 inches, three or four nails in each end of this stringer leading over on the bents and from one to the other, and then another one nailed by the side of it and nailed, and across the bridge that way, would that in your judgment be sufficient——

A. —Yes sir, that would hold the bents in position unless the foundation gave away; if something happened to the foundation nothing would hold; three or four times the amount of timber across would not hold if the foundation gave away.

Q. Do you know of any permanent bridges that are constructed on the plan of the one described, that are retained in use by the railroad companies?

A. No sir, I don't.

Q. Is it not a fact that what is called false work is used at places where it is well recognized that permanent work in the way of
118 steel structures will eventually have to be put in?

A. Yes sir.

Q. And they are commonly erected in this way?

A. Yes sir.

Q. Is it customary for the railroad to use them for any length of time before the permanent work is put up?

A. Yes, they sometimes use them for months.

Q. For regular traffic?

A. For regular traffic, sometimes for six or eight months.

Q. You do not know how deep bed rock was out here, do you?

A. No sir, I don't know how deep.

Q. If it should happen to be 50 feet from the surface of the earth, would it be practicable to drive piles down to that depth?

A. Fifty feet?

Q. Yes sir.

A. No sir.

Recross-examination.

By Mr. WELLS:

Q. How deep is it practicable to drive piling?

A. Well, 18 feet is considered pretty deep in quick sand.

Q. Do you know that piling has been driven a good deal deeper than that?

A. I don't know as I know, no sir, not in quick sand; I don't think that I have ever known it.

Q. Have you known it in any other material?

A. Oh, yes sir.

Q. How deep?

A. Well, I have known piling to be driven 30 feet in very soft material.

Q. Have you ever known it to be driven 50 feet?

A. No sir.

Q. Now, why could it not be driven just as far in quick sand?

A. There is something about the sand that adheres to the pile when you get it down so deep, it would tear the pile all to pieces; it would not stand the drive.

Q. Well, don't they drive piling into quick sand deeper than that by another method?

A. They do with jet-piling.

Q. Now, by that method they can put it down any depth they want to?

119 A. If they can get the piling long enough.

Q. You can get it down just as long as the piling is?

A. Yes sir.

Q. How long do you get the piling?

A. I don't know.

Q. Eighty feet piling is on the market, isn't it?

A. Yes sir.

Q. So that by using the jet-piling you can get the piling down 80 feet, if necessary?

A. Yes sir.

That is all.

W. P. HOMAN was the next witness called to the stand and gave the following testimony under oath:—

By Mr. MOSELEY:

Q. What is your business?

A. Civil engineer.

Q. How long have you followed that calling?

A. Off and on for a good many years, 40 years since I first went into the engineering business.

Q. Mr. Homan, are you the engineer in charge of this railroad from Oklahoma City to Quanah?

A. Yes sir, I was chief engineer.

Q. In your business Mr. Homan, did you have anything to do with the bridges,—span bridges?

A. Yes sir.

Q. And false work and all that kind of business?

A. Yes sir.

Q. Did you draw the plans for this bridge over the Canadian river—the false work?

A. They were made in my office and under my direction.

Q. Mr. Homan, please state what penetration is considered sufficient for piling in this country in the river here?

A. Depending upon the soil, from ten and fifteen to eighteen feet, and some, more.

Q. What sized piling,—you take a bridge; say that the top of the

pile bents would be eighteen feet above the soil, and the penetration eighteen feet, what sized piling is considered safe in the use?

A. Piling from eight inches up, at the small end.

120 Q. What size would that make it at the large end?

A. That is a question I could not answer.

Q. What sort of piling would that be—oak?

A. Oak, yes sir.

Q. And how many piles to a bent?

A. In false work?

Q. Yes?

A. We use five.

Q. Is that considered safe?

A. Yes sir.

Q. How wide a bent would that give you?

A. Do you mean in this particular instance?

Q. No, just ordinarily?

A. It ordinarily,—well, it might be from 14 or 15 to 25 feet,—28 feet,—depending on how they were placed.

Q. Now, in the width of 28 feet how would those piles be arranged?

A. They would be arranged with three piles rather close to the track; the other two further out.

Q. Would that make it secure then?

A. Yes sir.

Q. What size are the caps?

A. 12 by 12 or 12 by 14.

Q. Would a 12 by 12 cap be sufficient?

A. Yes sir.

Q. Now they were spiked down with spikes, or rather bolted down with spikes 18 inches long to the piles; state whether that is the ordinary and usual way of fixing it?

A. Do you mean to the drift bolt?

Q. To the drift bolt?

A. Yes.

Q. State what is customary in the way of a pony bent, and tell the jury what a pony bent is, and also tell us how high the pony bents were on this particular bridge?

A. The pony bent on false work, or rather the sub-structure of the false work. There is a bent of piles that is put below the line of the lower cords of the steel span; then in between the two cords of the steel span is erected the pony bent to lay the track upon, and it is made narrower in order that the steel span can be erected upon each side of it; in other words this false work is only made to rest the steel span upon, and also to run trains before the steel span was

121 built. The trains moving on the regular grade of the road.

Q. Now, just give us a description of the pony bent, the size of the timbers?

A. Well, they vary—do you want this particular one?

Q. Yes. If you recall this on this bridge?

A. The pony bent is short posts sitting upon the top of the cap of the pile bent below; then they are capped with a stick of timber

across them, and the pony bent is attached to the lower bent by pieces of plank bolted to the cap of the lower bent and to the posts of the pony bent, a piece upon each side.

Q. What do you call those braces—sway braces?

A. Yes, one sway brace being at this angle and two that way.

Q. Have you any opposite braces on the other side, scabs or cleats?

A. Yes sir, scabs.

Q. What do you have on top of the pony bents?

A. Stringers.

Q. How are they constructed?

A. There was three stringers in this instance, 7 by 15 in size, and about 15 to 16 feet in length, resting—the ends of each of them, resting upon the pony bents. On top of them the ties were laid, and on top of the ties, the rails.

Q. What is the distance between these bents?

A. My recollection is that they were about 16 feet.

Q. Is that a proper distance in cases of this kind?

A. Yes sir, it might be more or less, but my recollection is that it was sixteen feet.

Q. Now, in the construction of those stringers upon which the crossties rest, you say you have three on each side?

A. Yes sir.

Q. Seven by 15 inches?

A. Yes sir.

Q. They butt together in the middle of each pony bent, do they not?

A. Yes sir.

122 Q. And they fasten together,—these sets of threes?

A. Yes sir.

Q. How?

A. By what we term —— blocks; they are pieces of 3 by about 15 inch plank, and between each two stringers is this 3 by 15 plank, a notch is cut upon the under side of it to straddle the cap of the pony bent; those pieces are about four feet long; and through the stringers—and through those pieces are bolts, iron bolts, with a head and nut.

Q. Now that shoulder coming down there prevents these pony bents from approaching each other?

A. Yes sir, it shoulders the shaking.

Q. What is the effect of this bracing between the pony bent and the pile bent?

A. I don't understand.

Q. What is the effect of this sway bracing and keeping of the pony bent down——

A. —to hold the whole structure together and prevent the lateral motion in the pony bent.

Q. Now, Mr. Homan, what would be the effect of stringers, from the cap of the pile bent, longitudinally, going from one pile bent to the other say 7 by 15 and drift bolted down?

A. Do you mean laid upon the cap of the pile bent?

Q. Yes, and drift bolted to the cap of the pile bent, two stringers, 7 by 15, and drift bolted down?

A. That would add to the safeness of the whole structure.

Q. How are the cords or the stringers on top of the pony bent fastened down?

A. By a bolt, drift bolted down.

Q. Now, is such a structure as we have described, in your judgment, safe, secure or not?

A. Yes sir, I should consider it so.

Q. Are structures of a similar character ordinarily built differently in this country?

123 A. I don't quite understand the question.

Q. I mean, is that the usual way of constructing them or not?

A. Yes, at times of course, the shape of the pony bents, in fact the shape of the false work is controlled to some extent by the character of the span which has to be put upon it—which is to be raised upon it.

Q. The character of the steel?

A. Yes, the character of the steel work, the shape of it.

Q. How high were those pony bents on this particular bridge?

A. I would have to give it to you from memory; I think between five and six feet; it might have been a little over six; I don't remember now.

Q. You look that up. I don't believe it was that high; but assuming it was five or six feet, would the plan that you have described sufficiently secure that?

A. Yes sir.

Q. What experience have you had in providing plans and building bridges?

A. It would be rather hard for me to tell you sir; my life has been spent upon the railroad, a very large part of it in construction and various capacities.

Q. What is the office to be performed by what is known as the travel run and camber run?

A. They are put upon the false work as scaffolding on which to raise the steel span.

Q. Are they considered as part of the steel span?

A. It is really the scaffolding to raise the span upon; they are not necessary to raise the false work at all.

Q. Their object is not to add security to the false work?

A. The object, no sir.

Q. Mr. Homan, is there any method in vogue with the railway people for testing bridges of this kind in times of high water or at any other time when it is desirable to test their strength, and if so what is it?

A. I don't know of any; a structure is supposed to be strong enough to hold up your trains, or your span. False work is
124 sometimes erected, but not to carry the train, simply as a scaffolding to raise the span. Then it would not be safe to put a train over that; and the case here, and in all cases between here

and Quanah, the false work was erected to carry trains as well as the span.

Q. Was that false work erected for the purpose of carrying construction trains, or to carry passenger trains, after it was turned over to the railroad company?

A. Erected to carry any trains that might go over it.

Q. And in your judgment it was sufficient for that purpose?

A. Yes sir.

Cross-examination.

By Mr. KEATON:

Q. Mr. Homan, in putting this piling down for the support of the track, those piles are the real support of the whole of the structure, are they not?

A. The whole structure is carried upon the piles.

Q. Now, does it make any difference what kind of soil or material that the piling is put in, as to the depth that it ought to be put?

A. Difference,—yes sir.

Q. It makes a difference?

—. Yes sir.

Q. You said that you had these plans drawn for that bridge across the South Canadian River?

A. Yes sir.

Q. Did you test that river before you drew those plans, or just drew the plans from general custom?

A. We made soundings sometime before we drew the plans, Sir.

Q. Did you supervise that yourself?

A. Not upon the ground; it was done under my direction.

Q. What do you mean now by making soundings; what is the purpose of that?

A. The purpose was to find the character of the soil or material in the river, and to find how far down from the surface of the sand it was to a secure foundation for a bridge pier.

125 Q. And you say that those soundings were made for the purpose of testing the soil or some hard substance for the purpose of putting in piers?

A. Yes sir, and for finding what there was down there; we wanted to know what there was below the surface.

Q. Where were those soundings made?

A. They were made in the line of the bridge at different points from shore to shore.

Q. At how many points between one bank and the other?

A. I think there was about four or five, I am not positive.

Q. At what particular points, do you know?

A. I could not tell you now sir; they were made at points that we supposed would show the matter thoroughly.

Q. Now, how deep were those soundings?

A. The deepest was about 52 feet, as I recollect it.

Q. Then what did you strike at that depth?

A. Solid rock.

Q. What was the character of the soil from the surface down to that?

A. In the deeper portion of it there was about 40 to 42 feet of quicksand, and at about that depth we began to find coarser sand, which grew coarser and coarser and finally became pebbles before we reached solid rock.

Q. Now, from the surface down about 40 feet there was quicksand?

A. Yes sir, except at this end of the grade where the rock was closer to the sand than that.

Q. Yes. Well now then, Mr. Homan, is this quicksand a very substantial soil to put the piling in; does it hold it very well?

A. I know it does; you can't drive them into quicksand; they have got to be jett-ed.

Q. Is that the way these were put in across the South Canadian?

A. Yes sir.

Q. And you think that quicksand is about the best kind of soil to hold piling?

126 A. It is an excellent foundation, if you confine it——

Q. Well, there was no measures taken to confine this sand around this piling, were there?

A. We didn't consider it necessary; the weight of the sand on top confined that below, where the points of the piles rested.

Q. How deep can you put piling with the jetty process?

A. I really don't know sir; you can put it down 30, 40, 50 or 60 feet; how far below that I don't know.

Q. You can put it down just as far as the quicksand goes?

A. Probably so.

Q. Well, are you acquainted with the character of this South Canadian River, generally?

A. Somewhat.

Q. It is usually quicksand, is it not?

A. Yes sir.

Q. As far as you know. Did you superintend the building of this bridge yourself, or just furnish the plans?

A. I furnished the plans and the work was done under my direction; I visited the work a good many times off and on; it was in the line of my duty to look after that, as it was other work; I was not on the work all the time.

Q. By whom were you employed at that time?

A. By the Oklahoma and Western Railroad Company.

Q. By whom are you employed now?

A. I am connected with that company.

Q. Did you ever work for the Frisco?

A. Never worked for them a day in my life.

Q. You were representing the Oklahoma and Western?

A. Yes sir.

Q. Now, contracts were taken from this company that you represented,—that is, different contracts to build the different parts of the line, were they?

A. Yes sir.

Q. And you did not inspect the manner in which this
127 bridge was actually built?

A. To some extent, yes sir.

Q. Do you know how deep the piling were actually put on your own knowledge?

A. Of my own knowledge, no.

Q. Were you about that bridge or did you see it shortly prior to the time of this accident?

A. Why, I think I did; I was up and down the road from time to time frequently.

Q. Did you know that this bridge or part of it had been washed out just a few days before this accident?

A. Yes sir.

Q. Were you there when it was replaced?

A. I was there after a portion of the false work had been washed out.

Q. How much of it had been washed out?

A. My recollection is that there was about three bents of it.

Q. And how long had that been in before this went down and the accident occurred?

A. I think the accident occurred on the 9th of June, I would say that we ran over that sometime in the latter part of April, from the 20th of April on,—somewhere from the 20th to the 25th of April.

Q. —Well, but after the washout;—was the washout in April?

A. No, the bridge was completed in April, and we ran trains until the ninth of June.

Q. Well, had not there been a washout a few days prior to this accident?

A. Oh, yes sir.

Q. Well, how long had that repair been made before the accident?

A. Well, I think it was only completed, the work, the day before; I think the accident was on Monday morning, wasn't it, whatever it was, and the work was completed, and I think a train went over it the day before, but I am speaking from memory, now.

Q. How did that wash out, do you know?

A. By a flood.

128 Q. Did the river cut a channel down to the bottom of the piling?

A. No man on earth knows how that occurs in that river I think.

Q. Was this your first experience with that r[illegible]?

A. Yes sir.

Q. Now, have you had any experience with any other river like that, prior to this time?

A. With rivers of that character, yes sir.

Q. It is a fact, is it not, Mr. Homan, that these rivers, these quick sand rivers, like the South Canadian, change their channels frequently in times of flood, and very rapidly, sometimes?

A. Yes sir, I think so.

Q. It is a fact, is it not that piling put down 18 — may be, in two or three hours, washed clear out from the bottom,—all the sand taken away from it?

A. Well, I don't think it would scour as deep as 18 feet; it is something that no man can state, what occurs in that water.

Q. Do you know that the Santa Fe bridge that crossed that same river at Purcell scoured over 25 feet deep and took out the piling?

A. I do not.

Q. Well, in any event, when that river is up and that quicksand is scouring, and the river is full of water, why it is a very unsubstantial soil or material for piling, or anything else to be in, is it not?

A. Not always.

Q. Well, it is frequently, is it not?

A. At times, yes sir.

Q. Now can you say that you think that this bridge that you have described—its construction,—was perfectly safe?

A. Certainly I consider it so, or I would not have built it that way.

Q. Well, what caused those spans or bents to go out, if it was perfectly safe?

A. I don't know.

Q. They did go out?

A. Yes, by flood.

Q. Now, do you know whether it was constructed before the accident the same as it was constructed after the accident; was it built according to the same plans?

A. Yes sir.

Q. Now, how did they get this piling in there within three or four days after they went out?

129 A. I was not upon the ground at that time, sir.

Q. You do not know whether they put them in in a proper and skilfull manner when they were repairing that bridge or not, do you?

A. I have reason to believe that they did.

Q. Well, did they have all the machinery there for driving that piling?

A. I believe they took it there.

Q. Do you know whether they had jets there so as they could bore down into this sand?

A. I do not.

Q. Don't you know that the river was up on a rather fresh tide, from the time those bents first went out a few days before the accident, up to time of the accident?

A. No sir, I know it was up and down, but I don't know that it was up all the time.

Q. Well, I mean from the time that first washout occurred up to the time of the accident?

A. No, I don't know that it was up all the time.

Q. In fact you were satisfied that it was never down low enough so that you could use your jets to bore down in the middle of the current and put the piling in at that time.

A. I don't know because the river went down very rapidly and came up in a night.

Q. Do you think that when it is up bank full, enough to wash both banks, that it would go down in a night?

A. I say sometimes it would.

Q. Well, it would do that sometimes and at other times it would take a long time to run down wouldn't it?

A. That depends on where it came from,—if it came from the head——

Q. —Well, where did that come from?

A. I don't know about that.

Q. But you do know that if the piling was not substantially
130 put down they would be likely to give way, and that would make the whole superstructure go with it?

A. If they were not properly put in they would certainly be liable to accident; if they were properly put in, I don't see why they should.

Q. Now, if a bridge was properly put in across that river, to be safe, it would have to be put in in a manner to withstand the high water, would it not,—if it was safe at all times.

(No answer.)

Q. For a bridge to be built across the South Canadian River in a manner to be safe during high water, it would have to be constructed in such a manner as not to be washed out by the high water?

A. Well, if it lasted through the high water it certainly would.

Q. Well, if it was built so as to be safe in high water, it would have to be built so as to be able to withstand it?

A. Certainly.

Q. Now you say that this bridge was built in accordance with the plans and specifications that you prepared, or that they were prepared under your directions?

A. Yes sir.

Q. And you know that this particular bridge went out during that high water?

A. Yes sir.

Q. Now then you know that this bridge was rebuilt as nearly according to the same plans and specifications as they could be put in considering the condition of the river?

A. Well, I suppose the bridge was rebuilt in the original manner.

Q. The same way as it was before?

A. Yes sir.

Q. Then you and your bridge men ought to have known, must have known, that the bridge was not safely constructed over that river when it was first washed out?

A. We did consider it so.

Q. If the bridge was washed out a few days before this accident, you knew that those plans and specifications were not sufficient to build a substantial and safe bridge across that river, didn't you?

A. We certainly considered them safe and substantial, or we certainly would not have sent a train over that road.

Q. How could you consider it safe and substantial when the river had already washed it out?

A. Well, it was the result of experience with other rivers of the same character, and experience with this same river,—not of my own.

Q. Well, you had just had experience there to show that a bridge built at that place across that river according to those plans would not stand, had you not?

A. Well, that didn't stand, but that was no reason why it should not stand when rebuilt, because the engineer might take another point.

Q. Yes he might, but he might take the same point?

A. Certainly.

Mr. KEATON: I think that is all.

Redirect examination.

By Mr. MOSELEY:

Q. Is it not a fact that that was a- extraordinary flood?

A. That is my understanding sir.

Mr. WELLS: Objected to, on the ground that the witness has not shown himself qualified.

The COURT: Overruled; he has already answered.

Q. Mr. Homan, you say you were in the employ of the railroad company?

A. Yes sir.

Q. You were not employed by McCabe & Steen in any respect, were you?

A. No sir.

Q. As I understand it, you furnished the plans and specifications and they did the building?

A. Yes sir.

Q. Under your supervision?

A. Yes sir.

Q. Now, when you were not there did you have a representative on the ground?

A. Yes sir.

Q. Did you have a representative there, that is, an engineer under you, watching McCabe & Steen, during the time that this
132 bridge was being reconstructed?

A. Yes sir.

Q. Who was that?

A. R. F. Grall.

By Mr. KEATON:

Mr. KEATON: Do you know whether he was there at the time that this bridge went out, or when the- were rebuilding it?

A. I know that he was there, yes sir.

Q. At the time it was rebuilt?

A. Yes, I sent him there for that purpose and to take care of the rebuilding of it.

By Mr. MOSELEY:

—. Is it not a fact that the piles on this side of the river, that is, the Oklahoma side of the river have a good many, or some of the bents went down to solid rock?

A. Yes sir.

Q. Do you remember how many bents on this side of the river went down to solid rock?

A. No sir, I don't.

Q. How was that rock, was it level across the bottom of that river, that is, was it horizontal or was it slanting?

A. At the point where the piles were driven to the rock, it was sloping, and it sloped down to a point where it reached about 52 feet below the general level of the sandy stream, and from that point on it was almost level. Our soundings on the other side of the river showed the same depth that they did at the foot of the slope.

Recross-examination.

By Mr. KEATON:

Q. Now you don't know how many bents it had on this side down to where it became level?

A. No, I don't.

Q. And you don't know how many piles touched the rock?

A. No.

Q. You say that it was your understanding that it was an extraordinary flood there in the spring of 1902?

A. That is, from what I heard.

Q. You had another extraordinary flood in 1903, that spring didn't you?

133 A. No sir, I don't think we did; we did not have an extraordinary one the year before.

Q. Well, they did this year, didn't they?

A. I don't know anything about it this year.

Q. Don't you know that it is a river of extraordinary character, and that it has extraordinary floods almost every year at some seasons?

A. No, I don't know that.

Q. Don't you know that it is a fact, or do you know whether it is, that the head waters come down almost in one solid wall of water, from ten to 12 feet high?

A. No, I never heard of its being that high.

Q. Well, eight or ten feet?

A. No, I haven't heard of that height.

Redirect examination.

By Mr. MOSELEY:

Q. How long was it intended to use this bridge before the steel structure was put up?

A. There was no time specified; the work was already let for the steel spans and they were expected to be delivered very shortly afterwards; I think the steel span was delivered, a portion of it at least—nearly all of it, very shortly after this flood, but I am not quite positive.

Q. You do not know how long this bridge was actually used until the steel spans were put up do you?

A. I think the steel spans were erected along in October.
Q. Of the same year?
A. Yes sir.

Recross-examination.

Mr. KEATON: Was the permanent bridge built by McCabe & Steen too?
A. Do you mean the steel span?
Q. Yes?
A. No.
Q. I mean did McCabe & Steen build the trestle work for the steel span bridge?
A. Do you mean the false work?
Q. The false work and the permanent work.
A. There is no permanent work under the steel span.
Q. It was all false work?
A. Yes sir.
134 Q. And they built that?
A. Yes, and they also built the temporary trestle that is over the river beyond the steel span, that is standing yet.
Q. Do you know how far down the *peir-* of that bridge are now?
A. The stone pier-?
Q. Yes?
A. About 52 feet below the sand.
Q. You put them down to bed-rock?
A. Yes.
Q. Now, if it was necessary to put that pier down to bed rock, why was it not necessary to put those piles down to bed rock?
A. Because it is a very different structure; the weight of that stone alone is 750,000 pounds, and the other bridge had five piles in fifteen feet, and now it has got two piers in 1500.

That is all.

FRED WARREN was the next witness called to the stand by the defense and gave the following testimony under oath:—

By Mr. MOSELEY:

Q. Where do you live?
A. St. Louis.
Q. What is your business?
A. I am bridge engineer in the construction department of the Frisco.
Q. Where are you working now?
A. I am working on the A. V. & W. at Perry and Pawnee.
Q. Have you had any experience in bridging the Canadian River?
A. No sir.
Q. Have you had any experience in bridging either of the rivers here in this territory?
A. Yes sir.
Q. What is it?

A. I built a bridge over the Cimarron river, and over the Colorado River in Texas, and Pepper Creek and Blackberry and Cow Creek, and Fisher Creek and Brady Creek.

Q. Is that of a character similar to the Canadian?

A. Why, I think that the Cimarron is of a character simi-
135 lar to the Canadian.

Q. Your business is to draw plans for false work as well as for permanent bridges, is it not?

A. Yes sir.

Q. And see it put in?

A. Yes sir.

Q. I wish you would tell the jury the character and construction and size and material etc., that it is considered safe for false work where the bridge is not more than eight to ten feet above the bottom of the water?

A. Well, we use piling, 12 inch piling, 12 by 12 caps, posts for pony bents, 12 by 12, with a cap on top of the four posts that go to make up the pony bent, and then stringers, 7 by 16, 14 feet long, to the best of my recollection——

Q. Where are those stringers placed?

A. On the top of the pony bents.

Q. What stringers did you place on top of the pile bent?

A. Right on top of the pony bent for false work,—that is, the stringers on top of the pile bent.

Q. Yes?

A. Well, I usually use for the Cambria track the stringers that I use in the ordinary track work.

Q. Then, in the construction of the false work, did you ordinarily put stringers from one pile bent to another?

A. Well, sometimes we put them there.

Q. Well, do you often have that object in view?

A. No.

Q. Now then if the false work has stringers, or if you did have stringers on the false work, 7 by 15 inches, say, would that be considered as a good job?

A. Yes sir.

Q. And that would be in addition to the work already done?

A. Yes sir.

Q. What penetration would you regard as sufficient?

A. 12 feet, 14, ten, anything like that.

Q. What would you say about an average of 18 feet?

A. Why I should think it was plenty.

136 Q. In fact you think that more than the penetration ordinarily given?

A. Yes sir.

Q. Now, in a bridge such as you have described, is that regarded as ordinarily safe and secure?

A. Yes sir.

Q. Do you know anything about this structure that fell in here on the South Canadian River?

A. No sir, I don't know anything about it at all.

Cross-examination.

By Mr. KEATON:

Q. You never built a bridge or superintended the building of one across the South Canadian River?

A. No sir.

Q. Is it a fact Mr. Warren that the condition of the soil that you put your piling in has something to do with the depth that they should be put?

A. Why we usually drive the piling to a penetration that is what we consider as far as is necessary; that is, we drive it down until a certain resistance is obtained.

Q. Suppose it was a river that was quick sandy, and the quick sand went down forty feet, and high water was likely to scour it from 15 to 18 feet, then what depth do you think the piling ought to be?

A. Well, you can only drive the piles, unless by jetting down to a certain distance.

Q. Well, suppose the piling was put in by jetting?

A. Well, I don't see the necessity of putting down false work piles 40 or 50 feet.

Q. False work piles have as much to carry as any other kind, have they not?

A. But only temporarily.

Q. Then you take your chance of their washing out, or of trains going through?

A. No.

Q. Only the permanent bridge is safe, is that the idea?

137 A. No sir, no sir; it does not require as heavy work for false work as it does for an ordinary bridge structure

Q. You say it does not require as heavy?

A. No sir.

Q. Why don't you know Mr. Warren, or isn't it a fact that when you have your false work, the false work has got to support those steel spans that are put up in addition to the weight of the train carried over them?

A. Why certainly, up to a certain point.

Q. Well, suppose it is a bridge that is built now simply for the purpose of carrying trains across, but the false work is built wide enough and for the purpose of putting steel spans and supporting them until the permanent bridge and track is laid, then would you say that those piling had as much to support as if they were supporting a permanent bridge?

A. Well, when you take into consideration that your piling will naturally support a great deal more than is ordinarily a train weight on them, why I think that it is fully adequate to carry both bridge and the train too.

Q. But you said awhile ago that this didn't have to carry the same weight as there would be on a permanent bridge, if I understood you?

A. Well, considering the short length of time that it has to be in, I can't see that it is necessary to go ahead and put down piling as

deep as we would on a permanent structure which is intended to stay there for years.

Q. Then if you do not put it down as deep as you would on a permanent work, it is more unsubstantial than it would be if it was put deeper?

A. Well, I think the test of time has more to do with that.

Q. Well, that is not answering. If you put them down usually 18 feet, they are not as substantial as if you put them down 25 or 30 or 40 or 50 feet, for a permanent bridge, are they?

A. No sir.

138 Q. Now suppose this river scours as deep as 18 feet in times of high water, would you consider piling put down 18 feet for false work supporting the bridge, as a sufficient depth, in times of high water?

A. No, not if it took it out to 18 feet, it would not.

Q. Well, suppose it scoured 12 to 15 feet?

(No answer.)

Q. If the sand washes away from one of these piling down to within three or four feet of the bottom, it is ready then to tumble either way or the bottom go out, isn't it?

A. Well, we have some work that we have figured on where we have had only six or seven feet penetration that has been perfectly safe.

Q. Where is that?

A. We have some of that on the Colorado river.

Q. Do you know whether the Colorado river is the same kind of a river as the South Canadian river?

A. No, I don't know much about the South Canadian.

Q. Suppose you had constructed a pile bridge or a bridge supported by piles, and put those piles in a depth of 18 feet, and the first high water that came, it took three or four bents or spans of your bridge, would you consider then that it would be good skilful workmanship in bridge building to put those piling back and put them the same depth and at the same places and build the bridge in the same way as before?

A. I would not consider it a good plan if there wasn't enough to hold them up, no.

Q. Well, suppose you built this bridge across the South Canadian River, and put your piling in 18 feet penetration and the first high water took out three spans or bents, now would you consider it a workmanlike job to go to work and drive the piling in again just 18 feet, and build the bridge just in the same way again?

A. Do you mean 18 feet penetration below where they washed out?

Q. No, just put them back so that the piling came right up
139 to the same height above the ground that they were before?

A. Well, if the sand is washed out there is no penetration at all.

Q. Well, would you suppose that it was safe to put it down again if the sand had washed out and taken three bents of the bridge?

A. Why, if I had 18 feet of penetration again, I would consider it safe.

Q. Well, you really cannot figure that 18 feet is enough if it washes out; if you put it back again 18 feet and keep it at 18 feet, you consider it safe then?

A. Well, if it washes out the sand 18 feet, you have no penetration at all; that is, if you took it out 18 feet, and put your pile back in the hole after it had washed out, there would be no penetration, and I would not consider it a good job at all.

Q. Well, suppose you find that high water takes it out, then would you consider it safe to put it back 18 feet?

A. Why 18 feet below from where it washed out might be an absolutely safe position.

Q. Well, suppose it washed out that hole and took this piling out, and then filled that up again with sand, would you consider it safe to put that piling back in that sand again, and that that would be safe in a time of another high water?

A. Well, I have no idea that another scouring would commence at the same point, in wide streams that would not be likely to happen.

The COURT: That don't answer the question: would you consider it safe.

A. Why, if I have 18 feet of penetration, and the sand has washed in there and it was solid, I would consider it safe.

Q. Suppose this is in a stream where the quick sand was 40 feet deep and the stream washed it out that way and in washing it out changed its channel, would you consider 18 feet penetration sufficient?

A. Yes sir, I think I would.

Mr. KEATON: That is all.

140 Redirect examination.

By Mr. MOSELEY:

Q. Suppose you had sunk those piles 30 feet in the sand and 20 feet of the sand would scour off leaving 20 feet of water over your piles, would you have any safer structure than you would at 18 feet?

A. I don't think so.

Q. Why would you not?

A. Because you have your piles sticking up out of the ground so that the vibration becomes fainter there——

Mr. KEATON: Then you mean to say that there is no greater security in going 30 feet and the sand scours out than in going 18?

A. No, I don't.

Recross-examination.

By Mr. KEATON:

Q. Now, let's see: you say that if this piling had been put down 30 feet, and 20 feet had washed away—of the sand around them—

leaving,—that would leave them 10 feet still in the sand and the rest of it above, that that would not be any safer than if it had been put down 18 feet originally, and the sand had washed out two feet below the lower end of the piling?

A. Oh no, I didn't say that; oh no, no, (laughs), because if it was washed out two feet below the end of the piling there would not be anything for the piling to rest on.

Q. Then it would be safer to put it 30 feet than 18 feet, if it happened to scour 20 feet?

A. Yes sir.

9 P. M.—Court adjourns until 9 o'clock tomorrow morning.

9 A. M., OCTOBER 29TH, 1903.

Court convened, and the jury having been polled and all answering to their names, and all parties to the action being present, with their counsel, this case is proceeded with as follows:—

M. A. WALDO is the next witness called to the stand by the defense, and gives the following testimony under oath:—

141 By Mr. MOSELEY:

Q. What is your business, Mr. Waldo?

A. I am a civil engineer by profession; I am now a construction engineer.

Q. How long have you pursued that business?

A. Almost constantly since 1882.

Q. Mr. Waldo, are you acquainted with bridge building?

A. Yes sir, that has been my work,

Q. That is the work you mean that you have been engaged in?

A. Yes, as engineer I have made a specialty of bridge building and sub-contractor work particularly.

Q. Have you been engaged in the construction of bridges in this section of the country?

A. Yes sir.

Q. What bridges have you built here?

A. I have had charge of the building of two bridges over the South Canadian river in this immediate vicinity, one on the Oklahoma City & Western road and the other on the Fort Smith & Western at South McAlester.

Q. The Oklahoma City & Western road is the road on which this accident occurred?

A. Yes sir.

Q. What other work have you done?

A. Do you mean in times past?

Q. Yes, state the extent of your experience in that line?

A. Well, the larger jobs that I have been on, are five over the Missouri river, one at Omaha, Leavenworth, Jefferson City, — and —, one over the upper Mississippi and one over the lower Mississippi, at Memphis. Now I am working on two bridges on the Mis-

sissippi one at the mouth of White River, and one over the Arkansas, very close to the Mississippi.

Q. What plans are pursued in the construction of those bridges; I mean do you first put up a wooden bridge and then an iron one, or how is that?

A. The conditions that exist govern that entirely; they ordinarily put temporary work; otherwise they put in permanent struct-

142 ures as they go along.

Q. What plan was adopted at the Canadian River?

A. On this Oklahoma City & Western?

Q. Yes.

A. Well, they didn't adopt a plan at all, that portion of the road was built just as fast as it could be built.

Q. Did they put in a wooden structure first?

A. Yes.

Q. Well, how about the other bridge over the South Canadian that you were connected with?

A. It was built under the same conditions, they put in temporary work when first they built it, and put in a permanent structure afterwards.

Q. That temporary work is only put up for the purpose of operating the road for a certain length of time?

A. Yes sir, until such time as the permanent work is in place.

Q. Now is that the plan usually?

A. I think that is the more common plan, yes sir, though it is not always followed.

Q. You are acquainted with what is known as false work?

A. Yes sir.

Q. Can you give us a description of the false work that was put up on the Oklahoma and Western Road?

A. Yes, I can.

Q. Over the North Canadian River?

A. Yes sir.

Q. I will be glad to have you do so?

A. The bents, as we call them, consisted of five piles capped with a 12 by 12 cap; this particular false work was built not only to carry trains but also to facilitate the erection of the spans afterwards; for this reason there were two sections of the false work, that is, the lower portion, which was piles, and which was surmounted by a pony bent, which carried the stringers or floor of the bridge; the bridge was not only built to carry trains but also to erect the steel work and to carry the steel span until it was swung——

Q. —Well, you say that the pile bent consisted of five piles

143 mounted by 12 by 12 caps, now that was the pile bent; describe the pony bent that surmounted the pile bent?

A. As I understand it, the pile bent consisted of four 12 by 12 timbers about four or five feet high,—that is, the pony bent,—which were attached to the pile cap by sway braces, and what we ordinarily term scabs, that is, short pieces, a three by twelve plank bolted to the cap and to the posts; there is also some bracing connecting the

capping which is on top of the pony bent which carried the stringers or floor.

Q. State whether or not that is a secure way of fixing the pony bent to the pile bent?

A. Yes sir.

Q. The way usually adopted in structures of this kind?

A. That is a very common form of false work for that particular case.

Q. Now then what did you have on top of the pony bent?

A. There were stringers which reached from one pony bent to the other, and on those stringers are ties, and on the ties the rails.

Q. Do you remember the number of stringers on top of the pony bent stretching from one to the other?

A. Yes sir, there are three on a side, that is the customary arrangement.

Q. Were they touching each other or something between them, these stringers. One stringer abutted against the other.

A. I mean the three stringers that formed the chord, were they touching each other laterally?

A. My recollection is that they were separated by planks.

Q. To refresh your memory, I will ask you if there was not a cushion or plank of some kind between them that dropped down and formed some kind of a shoulder for——

A. There wasn't the first time that the trestle was built, but after the first washout they did notch those pieces so that they fit over the cap of the pony bent.

Q. Now let's go back to the pile bent; do you remember
144 whether or not there was any stringers placed upon the cap of the pile bent, longitudinal stringers?

A. You are speaking about the condition after the second washout?

Q. Yes?

A. Yes, there was two rows of stringers was placed there.

Q. What was the size of those stringers?

A. They were seven by fifteen inches.

Q. Running from the centre of one pile bent to the centre of the next pile bent and so on, was it?

—. Yes sir.

Q. Now were they fastened down to the caps of the pile bents in any way?

A. Yes sir, they were drifted.

Q. What do you mean by that?

A. A drift is a straight piece of round iron that goes through the timber, and these drifts were—I should imagine they were, in the neighborhood of 20 inches long, I would think.

Q. They were pinned to the caps of the pile bents were they?

A. Yes sir.

Q. Through the ends of those stringers?

A. Yes sir.

Q. Now, Mr. Waldo, from your experience as an engineer, tell the jury whether or not that would make a safe superstructure?

A. Yes, I considered it an absolutely safe superstructure for a pile trestle.

Q. Would it, in your judgment, compare with other structures usually adopted of a similar kind?

A. Yes sir, that is as strong as I have ever seen it, and I have seen later structures put in for the same purpose.

Q. Did you see those piles or any of them, driven?

A. Yes sir, I did.

Q. Now, I refer to the time succeeding what is known as the first washout?

A. Yes.

Q. Now, Mr. Fallaha went there with his men and repaired the bridge after the first washout; where was that washout, on this side or on the other side of the stream?

A. It was at this end of the stream.

Q. This end of the bridge?

145 A. Yes, this end of bridge.

Q. You say you saw the piles that replaced the ones that were washed out,—you saw them driven?

A. I didn't see all of them driven, but I had absolutely nothing to do, and spent a good deal of my leisure time watching them drive the piles and replace the false work, and saw pretty well all of them —about 50 per cent. driven; I could not say how many, now which ones.

Q. Did you see those driven, the first five or six bents from this end?

A. I saw a portion of all of the bents driven.

Q. Please state what the bents that were driven, say the five or six bents from this end,—what they rested on?

A. They unquestionably rested on rock.

Q. Now, to get that straight; the bents that were driven from this side of the river, towards the middle of the river,—how many would you say rested on rock?

A. Every pile I saw driven rested on rock; they stopped driving on rock.

Q. Do you know, or did you form any idea, by the depth to which these piles were driven, as to the condition and position of the rock; was it horizontal or was it slanting?

A. In a general way I know that the rock dips from this side towards the centre of the stream; that is, the piles that were driven furthest out in the stream, didn't have nearly as much cut off from them as the piles that were driven at this end.

Q. It is cut off from the top?

A. Yes sir, they are cut off——

Q. —In other words the piles that were out further went a greater distance to get to the rock?

A. Yes sir.

Q. Now take the six bents next to the shore, they would take a less distance to get to the rock through the dirt——

Mr. KEATON: Objected to as leading and suggestive.

Overruled.

146 (No answer.)

Q. Please state what distance in your judgment, in dirt, the bents nearest this shore went through before they reached the rock?

A. Why, I could not say. I would say that it was at least ten feet, perhaps more than that.

Q. And from that on, the depth would increase?

A. As I remember it, the piles, all of them, were driven somewhere between ten and fifteen feet into the sand through to rock; I kept no record of it, and it is simply my observation.

Q. Now, Mr. Waldo, it is in evidence that the piles nearest to the place where the pier was being built on this side,—pile No. 21, I believe Mr. Homer called it, sunk, previously to this accident, a few minutes,—that is it went down two or three inches. If it was on rock, can you explain how it happened to sink?

Mr. KEATON: Objected to as a misconstruction of Mr. Homer's testimony, and we submit that there has been nobody mentioned pile No. 21——

Mr. MOSELEY: Well, who was it?

A. He didn't mention any; Mr. Homer didn't know of any of them; he wasn't there.

Objection sustained.

Exception.

Q. Do you know the number of these bents Mr. Waldo, the way they were numbered?

A. No sir, I don't; I have seen it on the blue prints; I know from your question what bents you refer to.

Q. Were you there the morning this train arrived?

A. Yes sir.

Q. Did you see what occurred before the accident happened with reference to any movements on the bridge?

A. I didn't see the train when it first went on the bridge; I saw it after it backed off, and they were working raising one of the bents; the first bent towards the river outside of the coffer-dam which I had started to put in.

Q. The first bent next to this coffer-dam, what happened to that?

A. It settled.

Q. Did it settle?

A. Yes sir.

147 Q. You saw it after it had settled?

A. Yes, and the train backed off.

Q. Well, had that bent been washed out in the former flood?

A. My recollection is, I am certain that it was washed out in the former flood, I won't be absolutely certain about it; I think I know that it was washed out for this reason, that when they cut the trestle loose, that that bent was still standing there, but it afterwards washed out; that is correct.

Q. It was not dislocated, you think, at the time that the other bents were?

A. No sir, it wasn't.

Q. But subsequently you think that it was?

A. Yes sir.

Q. Well, this is one of the bents that you refer to as having been driven down to rock?

A. Yes sir.

Q. Well, if it was driven down to rock how can you explain that it sank or settled?

A. If it was on the rock there was only one way it could settle, and that was to slide on the slope; the rock there slopes down quite steeply.

Q. Mr. Waldo, were you present at the time that the bridge was washed out the first time?

A. Yes sir.

Q. Please state to the jury what kind of a flood was in the river at that time, whether high or low?

A. We had a rise at that time of about six feet altogether; the drift came down very thick and fast and heavy, and lodged against the bridge.

Q. What, in your judgment, was the cause of the destruction and damage to the bridge in that first flood?

A. I think if it had not been for the drift the bridge probably would have stayed in; that is, I don't think there was force enough to the water to take it out, but on account of the scour and drift that accumulated against it it was taken out.

Q. Do you know whether or not the damage was attributed to the drift by those there——

Mr. KEATON: Objected to as incompetent.

Objection sustained.

148 Q. Do you know whether or not that damage to the bridge was attributed to the drift by the engineer in charge of the pile driving?

Mr. KEATON: Objected to as incompetent.

Sustained. Exception.

Q. Now, I want to get at this same question with reference to McCabe & Steen's foreman and with reference to McCabe & Steen's judgment of it at the time?

Mr. KEATON: To which we object, at present.

Sustained. Exception.

Q. Now, please describe how that occurred, that is, was the bridge entirely washed out, or what happened there?

Q. Well, the first occasion that it washed out—*Q*. Yes, the 1st accident?

A. The river rose very rapidly in that neighborhood,—I think it was a trifle over six feet, the rise in the river. The South Canadian river rises differently from any other stream that I know of. Instead of coming up gradually, you go along up the river and see a big wave rushing down, and that is the way this particular rise came, and it carried with it an immense quantity of drift, which lodged against

this particular part of the structure. The drift and the channel seemed to be on this side of the river, and the accumulation of drift gradually bowed the trestle until the upper rail was below the lower rail, and the general structure came out and Mr. Kelebeck (?) came to me and wanted me to——

Mr. KEATON: Objected to as incompetent.
Overruled. Exception.
The COURT: You can tell what he did.

A. At Mr. —— request, we cut the rails and let that part of the structure out so that the drift could go down the river,—that part of the bridge that was bowed.
Q. What became of the drift?
A. A part of it went through the opening.
Q. What did that drift consist of?
A. Grass and brush and trees.
Q. Cross ways?
A. Yes sir.
149 Q. If no drift had come down, in your judgment, what would have been the effect of the water upon the bridge?
A. I believe that the bridge would have stayed all right.
Q. Was it your judgment that the old bridge could be reconstructed, and if kept free and secure from drift, that it would be safe,—at that time, I mean?
A. Yes sir, I think so.
Q. Do you mean that was your judgment at that time?
A. Yes sir, that was my judgment at that time.
Q. In pile driving, where you drive the pile through ten feet of soil on to solid rock, to support a structure of this kind, is that considered sufficient and secure?
A. Yes sir, it is.
Q. Is there any different or any better method of securing piles under such circumstances for a structure of this kind?
A. I know of none, no.

Mr. MOSELEY: I believe that is all.

Cross-examination.

By Mr. KEATON:

Q. How long is this bridge, Mr. Waldo?
A. Do you mean the temporary track, or clear across the river?
Q. Is there any difference in the length of the bridge clear across the river, and the temporary work?
A. The temporary work or the part of the entire structure that went clear across the river?
Q. I want to know how long that bridge was at the time and prior to the time of this accident?
A. I can only guess at it; I might say it was 1200 feet, the trestle work across the river.
Q. Now, the channel proper, do you remember how long that was,—how long is it between the piers?

A. Approximately 300 feet; I know they have a 300 foot
150 span; it is a trifle longer than that, two or three feet longer.

Q. How many bents did you say went out in this flood prior to the accident?

A. I could not say absolutely, but it was in the neighborhood of 7 or 8.

Q. That would be the entire portion of the bridge across the main channel of the river, would it not?

A. They didn't all go out.

Q. Well, practically?

A. Practically.

Q. Across the main channel?

A. Yes sir.

Q. What did you say was your connection with the building of this bridge there?

A. I have not said.

Q. Well, what was it?

A. I was representing Kahman & McMurray, the sub-contractors who were putting in the two piers that were required for the permanent work.

Q. Well, then you were not a party to the building the temporary bridge at all?

A. Had nothing to do with it whatever.

Q. What is your business now, what are you working at and in whose employ are you?

—. I am in the employ of A. J. Tullock; he is putting in two bridges for the U. P. railroad near the mouth of the White and the Arkansas Rivers.

Q. At whose instance did you come up this time?

A. I came at Mr. McCabe's request.

Q. Now, how long was it Mr. Waldo, after that flood had carried out this seven or eight bents of the bridge, before this accident occurred?

A. I think about three weeks; I want to say in this connection, if it is permissible, that I wrote for the diary that I kept, in which I had these dates, and it could not be found, and I have to guess a good deal of what I say about the time.

Q. What had been the condition of the river as to its being filled with water or otherwise, from the time that this pile bridge
151 first went up, up *at* the time of the accident?

A. The water gradually subsided until there was very little water in there.

Q. Well, was that the condition of it at the time of the accident?

A. No sir, there had been a rise the night before,—there had been a raise of about two feet in the river.

Q. Well, how high was it before that rise?

A. I suppose there was about a foot or two of water in the stream.

Q. Well, then there was only about three feet of water. You state the night before the accident there was a rise of two feet?

A. Yes.

Q. And before that rise came there was only about a foot of water in the stream?

A. Yes sir.

Q. Well, then there would not be over four feet——

A. —That is one of the conditions of the South Canadian River, when it comes up; if there had been a rise of only one foot,—and I don't think the rise at this time——

Objection to what he thinks.

Sustained.

WITNESS: Well, at the time of the accident there was in the neighborhood of ten or twelve feet of water there.

Q. Well, how do you make that out, when there was only a foot or two of water before this rise, and this was only a two feet rise?

A. From the fact that the silt of the South Canadian River is so very fine that when there is a rise the small particles float with the water, that is the only explanation that I have got.

Q. You mean that although the top of the water did only rise two feet, that it had washed out below so as to make it ten or twelve feet deep?

Q. It scoured?

A. Yes sir, that is exactly what I mean.

Q. Now, did you have anything to do with putting down those piles originally?

A. No sir.

Q. And you don't know just how many of them went down to bed rock?

A. Originally?

A. Yes?

A. I know nothing about it; the structure was in when I
152 first went there.

Q. Well, do you know anything about how far they went down, those that were replaced in rebuilding that bridge?

A. I think in the neighborhood of 12 or 15 feet; I saw them driven but I took no measurements; I stayed on the bank.

Q. You do not know whether they went to bed rock or not?

A. Yes, I know the piles I saw driven went to bed rock.

Q. How do you know?

A. I know it for the reason that the piles were jetted, and when the pile is jetted it goes through the sand very fast, almost like falling through the air, and it would come up with a sudden jar, and then when you hit it several times the pile would not move, and there was absolutely no penetration at all; the pile would stop dead.

Q. Now, how do you know that these piles were on a slanting rock?

A. I don't know anything about that only next to the pier, the first bent or two next to the pier; I could not tell you about the other, but I could tell from the way they drove that they went considerably deeper.

Q. Well, how could you tell that those next to the pier struck the slanting rock?

A. I know that, in the first place a first bent was next to our coffer dam——

Q. —What do you mean by a coffer dam?

A. A coffer dam is crib sunk by one method or another to hard rock, or to a good foundation, on which the pier is built; it is a means for keeping the water out for excavation.

Q. Excavating for putting the piers in?

A. Yes sir; this first bent next to our coffer dam; the coffer dam was about 12 feet wide, and on this side the rock showed up level;—our coffer dam struck the rock on this side eight feet higher than it did 12 feet further towards the river; and the rock kept on dipping for some little distance; I could tell that from the way the piles went—from the distance that the piles were driven.

153 Q. Well, do you undertake to say that those piles across there supporting this bridge were driven to bed rock?

A. No sir.

Q. Well, now, how many bents did you see them put in there when they were replacing the bridge?

A. I saw them working on all the bents,—both times,—I had nothing to do except to sit on the bank and watch them work I didn't stay around all the time, but I was there probably three quarters of the time.

Q. Well, then, if you know, how many bents, or piles for how many bents, were driven to bed rock?

A. All the piles were driven to bed rock that were driven after both of these washouts, I believe; all that I saw were.

Q. Now part of them went right out in the middle of the stream, and across the main current of the stream, part of those piles,——

A. —I don't understand——

Q. When you saw them replacing that bridge, you saw them driving the piles clear across that main current of the stream, to the other side of it,——

A. Yes sir.

Q. And you say that those piles went to bed-rock?

A. Yes sir.

Q. How deep was it there to bed rock, do you know?

A. It varied from this side as they went out.

Q. Yes, I understand; the last piles that were put in there; in repairing the bridge after it had washed out, the south side, it is furtherest to the south side,—how deep did they go to bed rock?

A. I would say over 15 feet.

Q. Don't you know that bed rock there was probably 50 feet, forty anyway?

A. No sir.

Q. How far was that south side of the bridge, or of the part of the bridge that was washed out from the north bank of the river?

A. Twelve hundred feet,—oh, from the north bank?

Q. Yes?

A. This side?

Q. Yes.

A. Well, it started right at the bank and continued out for
154 probably 100 feet, maybe 150 feet.

Q. Probably 150 feet. How deep did you go with your second pier, your second coffer dam?

A. The coffer-dam we had on this side, the second pier, was sunk by what we call the pneumatic process; we went 55 feet, in that neighborhood, with the pier.

Q. How far towards bed rock did you go?

A. We went three feet into bed rock.

Q. That is, on the north side of the river?

A. I am talking about the pneumatic pier.

Q. Well, is it on the north side or south side of the stream?

A. It is on the north side of the stream.

Q. And you went down how far with that pier?

A. 55 feet.

Q. And you went three feet into the bed rock?

A. Bed rock, yes sir.

Q. Now that pier was not out in the river as far south as the south side of the part of that bridge that was washed out, was it?

A. Yes sir, there were quite a number of bents north of that pier that wasn't washed out.

Q. Yes, but that wasn't the question.

—. Well, I don't follow you; I intended to.

Q. That pier that you put down on the north side of the stream—that you put 55 feet down—that was not as far out in the stream—as far south—as the south side of the portion of the bridge that was washed out by that washout, was it?

A. Why it was further.

Q. Your north pier then was further out in the stream,—further south—than the south side portion of the bridge that was washed out at that time?

A. Yes sir.

Q. Did you have any pier north of that?

A. Yes sir.

155 Q. Well, then, this was not your north pier?

The COURT: How many piers were there?

A. Two piers, one pier on the north side of the shore, and this other one was 300 feet towards the Chickasaw from there.

The COURT: The span was 100 feet?

A. Yes sir, the steel bridge that was to go in there was 300 feet long, and the piers were practically 300 feet apart.

Q. Well, how deep did you put your pier on the north side of the stream, this side, you know north and south don't you there?

A. Yes sir.

Q. Well, on the Oklahoma side, how deep was your pier?

A. The pier went about 11 feet deep on the north side and about three feet on the south side, into the rock; we struck rock on the north side eight feet higher than we did on the south side.

Q. Now let's see, the north side, or north pier, was how deep?

A. We went about 11 feet into the rock on that side.

Q. And how deep was it from the surface of the ground to rock,—that is what I am trying to get at?

A. Well, the rock is pretty near on the surface of the ground there, above the water.

Q. Well, you were away up on the north bank with that pier then?

A. We were when we started, but we were in the river before we got through.

Q. Well, how did you get any closer to the river when you got through than when you started?

A. The river came to us, it washed out.

Q. Washed this way?

A. Yes.

Q. Now did you make any sounding or test Mr. Waldo out there at about the south side of the part of that bridge that was washed out, to know how deep it was to bed rock?

A. No sir.

Q. Then you don't know?

A. No sir, only approximately; I could guess at it.

Q. Well, you don't know whether the rock dipped any more after it got out into the main stream there towards the north side of the river or not, or whether it dipped part of the way down and then ran level?

156

A. No sir, I could not say about that.

Q. You don't know about that?

A. No sir.

Q. Then you don't know whether those piles driven out there in the middle of that stream and on the south side of the main current, were driven to bed rock or not?

A. No sir, personally I do not.

Q. Do you know how deep they were to go according to the plans and specifications of that bridge—the plans and specifications under which and according to which that bridge was to be built; do you know how deep the piles were to be driven?

A. It was the intention to start at this end and drive to bed rock, until they got a penetration of about 30 feet, where there was no bed-rock, at least thirty feet. I may not be just exactly right about it, but that is pretty near right.

A. You did not see those plans?

A. No sir.

Q. Don't you know that 18 feet was the depth that they were to penetrate?

A. No sir, I think they went a good deal deeper than that?

Q. They should have gone deeper unless they struck bed rock before or by the time they reached 18 feet, should they not?

A. Well, I think that was the intention.

Q. Well, now, whether it was the intention or not, good workmanship in constructing that bridge would have required that they go as deep as 30 feet unless they struck bed rock, would it not?

A. They ought to go as far as practicable, yes sir.

Q. So that if they only went 18 feet, and according to the plans and specifications of the bridge, for the construction of the bridge, it only called for 18 feet, and they went according to those plans

and specifications, and they did not strike bed-rock within the
157 18 feet, they you would say that the bridge was not properly constructed, would you?

A. I would not say that, no sir.

Q. How deep can they put piling with this jetting process.

A. I have known them to be put down 100 feet.

Q. What is the longest piling that they used?

A. Well, it is pretty hard to get 60 foot piling.

Q. Well, where did you know of them using 100 feet piles?

A. At Omaha, Nebraska.

Q. Was that 100 foot timber or did they splice it?

A. They were spliced.

Q. You can splice them can you?

A. Yes sir.

Q. Now, Mr. Waldo, I want to ask you what provision had been made there in the construction of that temporary bridge, if any, for allowing the drift to pass through, when the river would rise and carry it down there?

A. There was no provision made.

Q. None whatever?

A. No more than that there men that tried to keep the drift out.

Q. Just there for that purpose?

A. Yes sir.

Q. If this rock was as slanting there as you have described, and the parties who put that piling in knew it, would you say that it was safe to drive the piling simply down to bed rock and stop, or would it have been proper to make a footing for the piles?

A. It was absolutely safe as long as the soil was around it.

Q. Well suppose the soil was carried away?

A. I think then it was unsafe.

Q. Well, would not it have been safer then, if you made a footing in the bed rock for the piles?

A. Yes, it could be done; I would not know how to make it.

Q. Well, you could take the rock out and put the piling in, and make a footing for it couldn't you?

A. Yes, it might be done; it is impracticable though.

158 Q. How?

A. On account of the expense,—more time perhaps than expense.

Q. Well, how did you do this jetting, what kind of machinery did you use, and how is piling put in by jetting?

A. Well, they have a steam pump which pumps water through a pipe to where the pile is to be jetted, and there is a hose connected with this piece of pipe close to the driver; to this hose is attached another piece of pipe, and one end of this pipe is attached to the hose, and the other end, the nozzle of the pipe is put alongside of the pile and the pump started, and as the water spurts around the point of the pile, the pile starts and the water follows up the pile; that is the way the friction is reduced, and permits the pile to drop.

Q. Now do you know whether or not that South Canadian River is a treacherous quicksand stream?

A. Yes sir, I do.

Q. You know that it is?

A. Yes, I know lots more about it now than I did then, that's all.

Q. Now you spoke of scouring; how much have you known that river to scour, how deep?

A. I could not say how deep, probably the deepest I ever knew it to scour was directly where the engine went in; it must have scoured there 12 or 15 feet.

Q. At the time that this engine went in?

A. Yes.

Q. What, in your judgment, was the course of that engine going down there,—you saw it go down?

A. I saw the engine do down, yes sir

Q. Now, what, in your judgment, caused it?

A. Why, I could not say just exactly what the cause of it was, the reason that it went was because there was absolutely nothing to support the piles; they were simply standing up there bare on the bed rock.

Q. Well, you do not know whether they were on the rock or not, do you?

A. I think I do, most of them.

Q. Well, that engine went right straight down, didn't it?

A. Yes.

Q. Well, if the piling were on bed rock,—did they break?

159 A. No, they doubled up like a knife.

Q. Were the piles there strong enough to support the engine?

A. Yes sir.

Q. Well, if they were down on bed rock then they would have supported it or else the bridge would have had to have fallen one way or the other, would it not?

A. The bridge did fall,—the piles of the pony bent, like a jack knife; they laid down.

Q. Laid down which way?

A. The points went towards Chickasaw, and the heads of the piles came this way, and the top of the pony bent went towards Chickasaw.

Q. The top of the piles went towards Chickasaw?

A. No.

Q. How was it then?

A. I said the points of the piles——

Q. The bottom?

A. Yes,—went towards Chickasaw and the tops towards Oklahoma City.

Q. Is the bottom of the pile the thinnest end of it?

A. It is the smaller end, yes sir.

Q. What was the diameter of those piles at the bottom?

A. In the neighborhood of eight or ten inches; I never measured them, but I know they were about the size of that.

Q. Now, Mr. Waldo, is it not your opinion that those piles were driven down there not to bed rock, and that this scouring of 12 or 15 feet had taken all the sand and support away from them, and that they went down——

A. —No sir, I believe they were driven to bed rock.

Q. You believe that all of those piles across there were driven to bed rock?

A. Yes sir, I know that all of those I saw were driven to it.

Q. Was every pile as far south as your south pier driven to bed rock; do you say that?

A. No sir.

Q. How deep do you think they were driven along there?

A. I could not say; I didn't see them driven; I only saw
160 those driven that were washed out; I didn't see the others driven.

Q. Then those that were washed out you saw?

A. Yes sir.

Q. Now when they put this bridge back, that was the same length of piling that they used as in the first instance, wasn't it?

A. I could not tell you that.

Q. Well, they made the top of the road bed there level with what it had been before?

A. Yes sir.

Q. How long had that bridge been in before this second accident,—that is, been replaced?

A. Why only a day or two or three, something like that.

Q. Do you think that the scouring of the sand away from the bottom had anything to do with its going out the first time?

A. Yes, I do; I think that if the material had not washed away from around the piles, that it was strong enough to hold what drift there was against it.

Q. Now how far out from the north side of the bridge had the engine gotten when it went down?

A. The pilot was probably 75 feet from the shore, probably a little more than that; I know this, that the tail end of the tender rested on our coffer dam, the rest of the engine being towards Chickasaw.

Q. Now that was at the part of the bridge that had been washed out before?

A. Yes sir.

Q. How are the bottom of those piles, are they pointed or cut off square?

A. Ordinarily jetting piles are cut off square, sometimes they are and sometimes they are not.

Q. How were those that were put in there?

A. My recollection is that they were not pointed; I am not sure but that is my recollection.

Q. What was the length of those piles that were put in there?

A. I didn't measure any, but I think they were about 35
161 feet long.

Q. How far was your south pier, that you went down 52 feet before you struck rock, from the south end of the southernmost point of the part of the bridge that went out?

A. About 150 feet, maybe a little more than that.

Q. That is the bridge that went out, was practically about 150 feet cut out?

A. That is my judgment, yes.
Q. From the north side of the stream?
A. Yes.
Q. How close were those piles together?
A. Do you mean the bents or the piles?
A. The piles, themselves?
A. There was one pile directly in the middle of the cap——
Q. —What do you mean,—out in the centre?
A. Right clear in the centre of the cap, and then there was one o either side of it, probably four feet from the centre, and the othe two were about, probably a foot and a half from the end of the cap there were five piles altogether.
Q. I don't know much about this bridge constructing; do the bent run lengthways with the bridge or across?
A. Across; the bents is composed of five piles,—five piles made bent. Those bents were of course parallel with the current of th river and set at right angles to the track.
Q. And they were about 16 feet apart?
A. My recollection is that they were 14 feet 9 inches; but I am no certain about that.

Mr. MOSELEY: Sixteen feet is right.

Q. I believe you said that the engine went down just south o your coffer dam, which was around the pier?
A. Yes sir.
Q. Just south of the south portion of it?
A. Yes sir.
Q. How far did your coffer dams extend south of the pier on th north side there?
162 A. We had no pier——
Q. —Well, where you were building the pier?
A. Well, as I said, the tail end of the tender was slanting up on th south edge of our coffer dam; in other words, the north end of th tender simply projected a foot or two beyond the south side of ou coffer dam.
Q. Now, that is the pier that you went down there eleven feet o the north side, and how far on the south side.
A. About three.
Q. That is, you went into the rock eleven feet on the north side
A. Yes sir.
Q. And three feet on the south side?
A. Yes sir.
Q. How far did the south side of your pier there go from the to of the soil, how far down from the top of the soil?
A. Oh, I would think that it was about,—the north side is wh you are talking about?
Q. No, the south side of your pier, how far did it go down fro the top of the soil, the north pier?
A. About eight or ten feet.
Q. Before you struck rock?
A. Yes sir.

Mr. KEATON: I think that is all.

Redirect examination.

By Mr. MOSELEY:

Q. Mr. Waldo, make that pier business plain: I believe you said that the piers were 300 feet apart?

A. Yes sir, a little more than that.

Q. Inside measurement?

A. They were probably 304 feet apart from centre of pier to centre of pier.

Q. At the time of the first washout, were you then engaged on the building of those piers?

A. We had started our coffer dam for the first pier on this side; we had done nothing——

Q. —The pier on the Oklahoma City side?

A. Yes sir.

Q. You had not begun building your pier on the south side?

A. No sir; we had the timber framed, but it was on the bank; we had done no construction.

163 Q. Now what is known as the false-work proper—the work that has to be replaced,—That extends between the piers, does it?

A. Yes.

Q. From the inside of one pier to the inside of the other one?

A. Yes sir.

Q. You say that, in building the pier, you construct a coffer dam that will hold out the water, and then go down inside the coffer dam to do the work?

A. Yes sir.

Q. You build a structure there that won't let the water inside of it?

A. Yes sir.

Q. Now, the first pile bent, beginning on this side, how far was that south or west of your coffer dam, on this side?

A. At the time of the first or second accident?

Q. At the time of the second accident?

A. About two feet and a half. They changed the location of the bents; I think it was seven feet and a half the first time, and they moved it towards the coffer dam when they reconstructed it.

Q. Now, the foundation for your pier was how far, how many feet, inside of your coffer-dam, on the south side?

A. Why to start our pier, we filled our coffer-dam with concrete.

Q. The coffer-dam and the pier were of the same size?

A. Yes sir, that is the bottom of the pier and the coffer-dam were of the same size on the inside.

Q. And the first bent of the false work was about a foot——

A. —About two feet and a half.

Q. About two feet and a half from the foundation of your pier?

A. Well, it would be more than that, because I count the thickness of the material of which the coffer-dam was made,—about eight inches; that would make it about three feet.

Q. Well, the first bent of the false work was about three feet from the foundation of the pier?

A. Yes sir, that is right.

164 Q. And you had to go through how many feet of dirt to strike the rock on that edge of the foundation?

A. Eight or ten feet.

Q. Now, that pile bent that was nearest to your pier, is that the bent that sunk first, when they were first sunk there, and when you saw the shimmering levelling up there?

A. Yes.

Q. Where was that bent that you are talking about, upon what part of the engine, if at all, did that come, when the engine went into the river?

A. The engine would have been past that bent, and the tender would have been over it.

Q. Only about five feet would you say, the back end of the tender would be over that bent?

A. Yes sir, I would say that was right.

Q. Now, do you know how long the tender is, of the engine?

A. No sir, I don't; it is about 15 feet, along in the neighborhood.

Q. Well, accepting that as the proper length for it——

A. —No sir, I don't know the standard.

Q. —I say, accepting that as the proper length for it, at the time of the accident, about two-thirds of the tender had passed over this first bent; I want to locate that?

A. Yes; that is correct; that is the way it was.

Q. And do you know about what length the locomotive and tender would be?

A. I think an engine of that size is about 60 feet long, including from the front of the cow-catcher to the end of the tender.

Q. With the tender?

A. Yes, that is in the neighborhood I know.

Q. Now then, let's see; if five feet of that sixty feet were north of the first bent, that would make 60 feet extending south of the first bent, would it not?

A. Yes sir.

Q. And that would reach how many bents?

A. That would reach,—that would be a distance of four or

165 five bents, a little over four, less than five.

Q. Well, at 16 feet it would be one——

Mr. KEATON: We object to counsel testifying; it is a matter of calculation for the jury.

Sustained.

Q. Do you know whether the second bent was at the regulation distance from the first bent, or was it nearer?

A. I think it is nearer, is my recollection.

Q. Well, never mind. Mr. Waldo, was any engineer supervising the putting in of those bents, after this first washout?

A. Yes sir.

Q. Who was it?

A. Mr. Grall was engineer in charge of the work, and the assistant that stayed with the driver,—I don't know his name—I don't know the name of the inspector of the pile driving.

Q. Was Mr. Grall there all the time?

A. He was there almost all the time, he lived about two miles from there, and whenever there was any work going on he was generally there.

Q. Now, state whether or not Mr. Grall was a competent engineer, and so regarded?

A. Yes sir, he was.

Q. What do you mean by supervising the work by the engineer Mr. Waldo, please state what the engineer did?

A. He looked after the material and workmanship, and that it should be built in accordance with the plans and specifications and the written contract; and the inspector has to look after the interests of the railroad company, and to see that the materials put in the structure and the workmanship is what the railroad company have contracted to get.

Q. Now what did this gentlemen do out there with reference to inspecting the timber, do you know.

Mr. KEATON: Objected to as incompetent and to the competency of the witness.

Overruled. Plaintiff excepts.

The COURT: If you know.

A. The timber was inspected in the yard here, Mr. Grall had nothing to do with the inspection of the timber, I do know that
156 Mr. Grall would throw a piece out.

The COURT: Do you know that he did?

A. No sir, I know that he would.

The COURT: Well, that would be incompetent?

Q. Well, now, let us come to the construction of the bridge, what part did he take in that,—begin with the pile driving?

Mr. KEATON: Objected to as incompetent and to the competency of the witness.

Overruled. Exception.

A. Mr. Grall or his representative was around the pile driving all the time.

Mr. KEATON: Objected to as incompetent.

Overruled.

A. —they measured it——

Mr. KEATON: What did you see them do?

A. They located the position where the pile was to be driven, and told the man that drove the pile when it was driven far enough, and also saw to the putting up of the timber and so forth, and that all the piles and so forth that were required in the plans were put there.

Q. Who operated the pile driver?

A. The first or second time?

Q. Well, after the washout?

A. I think Mr. Falaha.
Q. Do you know who he was employed by?
A. He was employed by McCabe & Steen.
Q. He operated the pile driver?
A. Yes sir.
Q. Did you say that Mr. Grall told him when the pile was driven far enough?
A. Yes sir.

Mr. KEATON: Objected to as incompetent unless the witness heard him tell it.

A. They had a sign when the pile was driven far enough, like this (indic.) and I have seen them stop when the sign was made.
Q. Are you acquainted with the duty and office performed by the engineer representing the company in work of that kind?
A. Yes sir, I am.
Q. What is that duty or office?

Same objection. Overruled. Exception.

A. His duty is to see that the contractor does his work ac-
167 cording to the contract——
Q. I mean with reference to the driving of the piles; what is the duty of the engineer?
A. To see that the specifications were carried out—the contract is carried out; that the subcontractor or the contractor has with the railroad company.
Q. Does he direct how far the piles shall be driven?
A. —and then the plans and specifications show how far the piles are to be driven; most specifications tell how far the piles shall be driven, or in what manner they shall be driven, and very often, the length of piles that shall be driven.
Q. What is the difference in level, in round numbers, in the level of the bank and the level of the stream, at low water?
A. Where the bridge landed, it must be about 15 feet, in that neighborhood; maybe a little more.
Q. Now, where you sunk your pier, you say your rock was slanting towards the river?
A. Yes.
Q. Dipped towards the river?
A. Yes.
Q. So that the part of the rock that was next to the bank was higher than the part of the rock that was further towards the river?
A. Yes.
Q. And taking the north side of your pier, and comparing the elevation of the rock there with the elevation on the south side of the pier, you found what difference in height?
A. About eight feet.
Q. Do you know what test is usually resorted to by persons constructing bridges of this kind?
A. Why ordinarily there are no tests made; it is supposed that the contractor——

Q. Would you regard pulling a loaded car out on the bridge as ordinarily a sufficient test as to whether or not the bridge was secure?

Mr. KEATON: Objected as suggestive, and the witness having answered that there are not any tests made.
Overruled. Exception.

A. Yes, I believe that there could be no better test than to
168 send a loaded car over the structure.
Q. Did you see the engine go upon the bridge at any time before the accident happened?
A. No, not over, but I saw it come back after it had gone over.
Q. You did see it come back?
A. Yes, I saw it come back from the pier that was furthest south to the shore.
Q. I don't understand.
A. I did see the engine come from pier 2 back with the car, to the shore, and I would consider that a test that the bridge was all right.

Mr. KEATON: Objected to as not responsive.
Sustained.

Q. Where was pier two?
A. Pier two was a little over three hundred feet south from pier one.
The COURT: How long is that bridge, there?
A. The steel work is 300 feet long, that one span.
The COURT: That is the longest span?
A. Yes sir.
Q. At which pier, at which one of your piers,—you said from pier one to pier two,—I misunderstood—I was thinking of bents. You saw that car,—You saw the engine,—you saw the engine bring the car from pier one—that was on the west side of the river, as I understand you, was it?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and leading; there is no west side.
Sustained.

Q. Which side of that river was pier two on?
A. The south side; that is, it was south from pier one.
Q. The pier one was on the north side or the Oklahoma City side?
A. Yes sir.
Q. Now, where did you see the engine bring that car from?

Mr. KEATON: Objected to as a repetition.
Overruled. Exception.

A. From pier two, from that neighborhood; it was out at pier two and the engine and car came over the trestle to the shore on this side.
Q. To the pier one side?
A. Yes, over to the shore, over on the bank.
169 Q. Now how long was that prior to the accident?
A. A very few minutes; it might have been five or ten, in that neighborhood.

Q. Do you regard that as an ordinarily sufficient test of the strength of the bridge.
A. Yes sir, I do.
Q. Mr. Waldo, was that false work strong enough in structure to bear up the weight of the engine and a loaded train?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, and not proper redirect examination.
Overruled. Exception.

A. Do you mean as designed?
Q. Yes.
A. Yes sir, it was.
Q. Is the false work designed to be of sufficient strength for that, or greater strength?

Mr. KEATON: Objected to as above.
Sustained.
The COURT: That is not redirect, gentlemen.
Mr. KEATON: None of it is redirect, your Honor.

10:30 A. M.—Recess for ten minutes.

Q. Mr. Waldo, you say that *it* the time the bridge was cut—the first flood, about 150 feet or in that neighborhood, of the bridge was destroyed?
A. Yes sir.
Q. Now, at the time the engine went in how much of the bridge was destroyed?
A. Somewhere from 75 to 100 feet, not over 100.
Q. Which was the greater flood, the first one or the second one?
A. The first one.
Mr. MOSELEY: That is all.

....

Recross examination.

By Mr. KEATON:

Q. How much did the last flood lack of coming up to the lower edge of the false work?
A. The first time?
Q. No, the last time, the time of the accident?
170 A. Why, I would say about seven feet.
Q. About seven feet down to the water?
A. No let me correct that,—about 9 feet,—no, it wasn't that much either, because the piles were short. I would have to look and see.
Q. Well, just your best estimate?
A. I would say about seven feet.
Q. And how high was the water; that is, how far below the lower edge of that superstructure, false work, was that flood, the first flood?
A. It was only about three or four feet below the caps,—that is what you mean.
Q. Yes, I mean the tops of the pilings?
A. There was about four feet difference in the two risings.

Q. How long had they been running trains over that bridge before the first flood?

A. Oh a month any way—I could not say just——

Q. Well, approximately, about a month. Now, Mr. Waldo, I will get you to state again the thickness of that north pier at the bottom?

A. Do you mean the width?

Q. The width north and south?

A. My recollection is that it is twelve feet.

Q. And the rock sloped eight feet from the——

Mr. SNYDER: Objected to as a repetition and as cumulative. Judge Keaton has asked the question five times on that proposition.

Objection overruled.

Q. The rock sloped from the north edge of the pier to the south eight feet did it?

A. Yes sir.

Q. Which one of those bents was it that first went down,—which first went the second time?

A. The first went directly towards the Chickasaw, from the coffer-dam.

Q. There were not any bents north of the coffer-dam?

A. Yes sir.

Q. How many?

A. My recollection is that there were two.

Q. Two north?

A. Yes sir.

171 Q. Now those are the ones they were repairing when you first noticed?

A. Yes sir.

Q. They had given down first?

A. Yes.

Q. And now about what one was it that gave down when the engine went through, or about how many and which ones?

A. They were, commencing at the coffer-dam, it was the first one south, and the second one south, and the third one south, and the fourth one, and I can't say just how many went out, but there were five or six went out.

Q. That went down with the engine?

A. Yes.

Q. Then the south part of the engine, or the south one that went down was about five or six from this first one, south of the coffer-dam?

A. Yes sir.

Q. And they are 16 feet apart?

A. Yes sir.

Q. And that, you think, would make the south part of the engine somewhere from 75 to 100 feet from this first bent, or from the coffer-dam?

A. Well, the engine is not that long. There was a bent or two, I don't know just how many, just south of the engine that went in; not

only those directly under the engine went, but one of two of thos south went in.

Q. Now was this man Grall there at the time of the accident?

A. I believe he was not, no sir; I am not quite certain that h wasn't.

Q. How many men were there?

A. Well, there were all the men of the train crew, probably 2 men; I don't know how many.

Q. Well, who was Mr. Fallaha working for?

A. McCabe & Steen.

Q. How many men did he have there?

A. I could not tell you, I don't know how many men; he ha eight or ten men more or less.

Q. What were they doing?

A. They had the shimmering up of these bents.

Q. That is the raising of them?

172 A. Yes, they raised them up and put the shimmers t it——

Q. —what is that?

A. That is the block of wood on top of the cap and under th stringers.

Q. They didn't raise the piling?

A. No sir.

Q. They simply raised the track or false work and put the block under it?

A. Yes, I remember now just how they did raise it; I went ou and saw them when they were working there, and went back to th office where I was writing letters.

Q. Was Mr. Bert there?

A. Yes sir.

Q. Who was Mr. Pratt employed by?

A. McCabe & Steen.

Q. In what position?

A. He had the title of superintendent on the railway; I don' know his duties any more than I know Mr. Fallaha's duties; I jus know what they did when I saw them.

Q. Now was Mr. Grall there at the time when this bridge was re placed?

A. Yes sir.

Q. That is the time you saw him there?

A. Yes sir.

Q. You said that he or somebody else gave the signal when th pile was driven far enough——

A. That was the ordinary method of letting them know that th pile had been driven as far as they cared to have it.

Q. Well, did Mr. Grall or somebody else do that when they ha driven the pile as far as it ought to be?

A. Yes, he or his representative would say "that is enough" an motion like this.

Q. That was when the piles were driven as deep as the plans an specifications called for?

A. Yes sir.
Q. As you understood?
A. Yes.
Q. Who got Mr. Wilson out of the water, do you know?
A. Yes sir.
Q. Who?
A. I assisted; in fact I went to him first, when he first rose up in the water.

Mr. KEATON: That is all.

Mr. SNYDER: Did you shove the plank to him?
A. Yes sir.

173 Redirect examination.

By Mr. MOSELEY:

Q. Are you able to state which bent it was that gave way first under the engine?
A. No, sir, I could not say. I simply noticed the bents under the engine, and they all laid down; one didn't seem to go any faster than the other.
Q. Did you mean to say in answer to Judge Keaton, that the bent next to the pile was the first to give way at the time of the accident,—next to the pier?
A. No, sir, my understanding was that he referred to when the engine first went over, not at the time of the accident.

L. J. CASWELL was the next witness called to the stand by the defendant, and gives the following testimony under oath:—

By Mr. MOSELEY:

Q. What is your business, Mr. Caswell?
A. Civil engineer.
Q. State how long you have been in that business?
A. Twenty seven years.
Q. Where have you been employed during that time?
A. All over the United States.
Q. How long in this section of the country, if at all?
A. In this section of the country since '83.
Q. Have you been engaged in bridge building?
A. Yes, sir.
Q. What bridges have you built?
Q. Why I have been superintendent of bridges and building on several roads.
Q. Name them?
A. The M. K. & T., Ft. Worth, Denver, on the Santa Fe, in Texas, and Quanh——
Q. Did you construct any bridges during that time?
A. Yes.
Q. On what roads?
A. Well, on the M. K. & T., the Santa Fe, and I have renewed

bridges on the Fort Worth & Denver, and have built bridges from Fort Worth to the Rio Grande.

Q. What did you do on the Ft. Worth & Denver?

174 A. I was division engineer in charge of the construction of bridges and grading.

Q. Work on the Canadian river?

A. Yes, sir.

Q. Did you ever build any bridges on the Canadian?

A. Yes, sir.

Q. Where?

A. On the Ft. Worth and Denver.

Q. What was your method——

A. ——

Objected to.

Sustained.

Exception.

Q. Is it customary before putting up the steel spans, the permanent work,—is it customary in this country to erect what is known as falsework?

A. Yes, sir.

Q. State to the jury what you mean by "false-work" and what its office is in railroad building?

A. Well, the false work is the structure built to allow the passage of trains prior to the erection of the spans.

Q. You use your false work then for the passage of trains temporarily, and for the erection of steel work also?

A. Yes, sir.

Q. What sized piling, say for piling 30 feet long, is considered safe in the erection of false work?

A. Well, a pile 12 inches in diameter at the large end and from six to eight inches at the small end is sufficient; I have used them smaller.

Q. To what depth ought they to be driven, Mr. Caswell?

A. Well, the penetration ought to be from nine to fifteen or sixteen feet.

Q. What depth should they be driven in rivers like the Canadian River.

A. A quicksand stream?

Q. A quicksand stream, yes?

A. Why, from 12 to 16 feet is sufficient.

Q. How many bridges did you say you had built over the Canadian?

A. I have built one at Denver over the Canadian, and I have had charge as superintendent of bridges and building where we renewed spans.

Q. Was the Canadian at the place where you crossed on the Ft. Worth and Denver, a quicksand stream?

A. Yes, sir.

Q. State to the jury what kind of false work you constructed there?

A. Why, in that instance, the false work was permanent
175 work,—used this trestle work for the permanent work.
Q. For how long did you use it?
A. Anyway for five years.
Q. When was that put up?
A. That was put up in '87.
Q. Now what penetration did you give to the piles in that work?
A. In that instance, all the way from 14 to 20 feet.
Q. Did you have a rock bottom?
A. No, sir, no rock.
Q. What other stream did you do such work on?
A. Well, Red River, crossing, that was trestle work and permanent work; the penetration there was from nine to 14 feet.
Q. How long was that used?
A. That was used as a trestle before there was any washout, five or six years, before any piling gave way.
Q. Do you know of another instance?
A. Well, there are streams in Texas,—we have erected spans over streams and have driven piles for false work from Ft. Worth to the Rio Grande.
Q. Did you use them for permanent work?
A. No, sir, this was false work for spans.
Q. What was the usual penetration?
A. Well, in quicksand streams if you can get from nine to fourteen feet I consider that sufficient.
Q. Do you know what the practice of civil engineers is in that respect?

Mr. KEATON: Objected to as incompetent.
Sustained.
Exception.

Q. Do you know what is customary in that respect?
A. Yes.
Q. Well, what is it?
A. Well, from nine to 14 feet.
Q. Is that usually considered safe?
A. Yes, sir.
Q. In sinking piles on the North Canadian River where you sink through quicksand say ten feet and strike rock, slanting rock say, and as you approach the middle of the river, the top of the rock got further from the surface of the soil until you get a penetration
of 15 to 18 feet before striking the rock, and down to a depth
176 of 18 feet say, and say that your piles went through until they struck bed rock; what would you say about the security of such a structure as that?

Mr. KEATON: Objected to as incompetent, and an hypothesis not based upon the facts.
Overruled.
Exception.

Q. Would that be safe or insecure?

A. That would be safe I would consider.
Q. Do you know of any method of improving that, that would be practicable?
A. No, sir, not in a quicksand stream, no, sir.

Mr. MOSELEY: That is all.

Cross-examination.

By Mr. KEATON:

Q. Mr. Caswell, you would build a bridge across a quicksand stream where the dip was eight feet in 12 feet,—8 feet to every 12 feet——
A. Eight feet dip?
Q. Yes, when you had commenced putting in your bents, pony bents and piles, within, as you say, four feet of the top of the ground, would you simply go down to the rock and stop, or what would you do there to make those piles secure?

Mr. MOSELEY: Objected to——

Q. —when the rock dips eight feet in 12.

Mr. MOSELEY: We object to the hypothetical question, because the evidence so far as it has gone in this case shows that the penetration of the first bent was at least 10 feet from the soil.
Objection overruled.
Defendant excepts.

WITNESS: Now, what do I understand,—whether I would drive to the rock——
Q. Suppose that the surface of the ground was four feet above the rock, and the rock dipped eight feet in 12 feet of space, would you go into the rock——

Mr. MOSELEY: If the court please, if there is any dispute about the testimony I would like to have the witness recalled.

WITNESS: If you go 12 feet drift to reach the rock at the second bent——
177 The COURT: He is speaking about the drift of three or four or five feet in the dirt until you struck the rock——

Mr. MOSELEY: We object to the question for the reason that the bents to which he alludes were not disturbed in this accident.
Overruled.

—and they were not involved in it.

Exception by Defendant.

Q. I want to know whether it is proper to go into the rock where it is only that much under the surface and slanting?
A. Well, in driving the piles I would drive to the rock that depth, until we got through the material——
Q. You would not go into the rock any?
A. No, sir, I would drive to the rock.

Q. Even if it was just a foot to the rock,—the dirt on top of it—you would just go to it, would you?

Mr. MOSELEY: Objected to as incompetent.
Overruled.
Exception.

A. Of course, in driving piles, if it was built upon——
Q. —No, you don't seem to understand. Would you stop on the rock or would you go into the rock, and make a footing for the pile, under any circumstances?
A. I would drive it to the rock, and if that was not sufficient penetration, I would go into the rock; some rock you could not penetrate.
Q. That is with the pile driver?
A. Yes.
Q. What would you do if you could not penetrate it?
A. Would simply have to drive to the rock.
The COURT: The question is, if there was only three or four feet of dirt, what would you do where the rock is slanting eight feet in twelve?
A. Well, I would drive to the rock.
Q. Would there be no danger to a pile going through ten or twelve feet of soil and striking the rock, that is, this slanting rock, would there be no danger to piling in time of high water?
A. Not as long as the sand remains there.
178 Q. Well, is there any danger of the sand washing away in the South Canadian?
A. Yes, the sand moves and shifts and fills up again.
Q. What bridges have you constructed across the South Canadian River, and at what point?
A. At Tascosa, Texas.
Q. How many miles from here is that?
A. Something like 250 miles possibly.
Q. 250 miles further up the river?
A. Yes sir.
Q. Did you ever have any experience in building bridges across this South Canadian River in Oklahoma Territory?
A. No sir, but I am familiar with it on the Santa Fe at Purcell.
Q. Do you know how far they put their piling on the Santa Fe at Purcell?
A. No sir, I don't remember now; I was on that construction but I don't remember.
Q. They put them over thirty feet, did they not?
A. I don't know.
Q. And then they went out; you know that that pile bridge went out, don't you?
A. Yes sir, but I don't know the depth.
Q. Now the bridge that you built on the South Canadian River where you say the piling was driven from 14 to 20 feet; how deep was the deepest one,—how deep was the penetration?
A. Twenty odd feet.

Q. How many odd feet?

A. 20 feet, I would not specify any inches, I know it was close to 20 feet.

Q. When you say 20 odd feet you mean——

A. I mean 20 feet.

Q. You said just now 20 odd feet, didn't you?

A. Possibly, but I meant 20 feet,—there may have been some inches.

Q. Now how long did that bridge stay?

A. Five years.

Q. And washed out?

A. No sir, just a few piles washed out.

Q. A few spans?

A. A few bents.

Q. A few bents?

A. Yes.

Q. How far apart were those bents?

A. 18 feet, those bents were.

Q. Do you know anything about this South Canadian River scouring around the piles?

179 A. It was like it was at Tascosa sir; it all scours.

Q. How deep will it scour?

A. It is variable; it is liable to scour to quite a depth.

Q. How deep?

A. I have no data.

Q. Oh, approximately, I mean; how deep have you known it to scour?

A. Well, piling driven two feet would scour out.

Q. Well, when a bridge has recently been washed out by a flood, and has just been rebuilt according to the original plans and specifications and the river is rising again, and an engine starts over a bridge, and gets out one or two, two or three bents,—pile bents, from the shore, and one of them goes down, then would you consider that that bridge was safe to start an engine and train over, after it had been chumped up?

A. I would try it with an engine, that is the only way to test it in a quicksand stream.

Q. But would you order a train across it?

A. Well, I have crossed on a train myself——

Q. Then, if the bridge went down you would consider it safe?

A. No sir, I would consider it unsafe if I had went down.

Q. Now, Mr. Caswell, is there more likelihood of an engine going through a bridge when it is hauling a heavily loaded train that it is when it is going over a bridge with no train or with one car?

A. Well, it would probably not go out while the train was on it; it would probably go out after the train had passed.

Q. Yes, but suppose it goes out; if the foundation was weak, if the quicksand was washing away and scouring away from the bottom of the piles, would the engine be more likely to go down on account of the foundation giving way, with it hauling a heavy train, than if the engine would go over alone?

A. No sir, it would be just the same,—the weight of the engine.

Q. An engine hauling a train is not any heavier tha- if it went over without a train?

180 A. No, sir, it is not.

Q. Is an engine heavier on a track when it is pulling a heavy train than when it is going by itself?

A. The weight of the engine is no heavier.

Q. Does it press down any heavier on the track by reason of pulling the train?

A. Not necessarily.

That is all.

Redirect examiation.

By Mr. MOSELEY:

Q. Mr. Caswell, suppose a loaded flat car should be pushed out on the bridge, say a half hour or an hour before the train went over, for the purpose of testing it, with say 20 to 30 tons of stuff on it, would you regard that as a test?

A. Yes, in weight upon it.

Q. Now suppose the engine should go out over the bridge and hitch to a loaded car and pull it over, before the engine started over with the train, would you consider that a safe test?

A. Yes sir, in weight going across the bridge, yes.

Q. Mr. Caswell, did you ever know of a case where the piles were sunk as much as ten feet through soil on to solid rock, whether there is quicksand or anything else, where there was any attempt made to sink the pile into the rock itself, in addition to that?

A. Yes, I have, because I have shod piles and tried; it depends on the nature of the rock.

Q. What do you mean by that?

A. Why, if the rocks are hard there is no use in going further; you would loosen everything up; if the rock is hard you want to stop on the rock.

181 Q. Well, on slanting rock, so that your next bent goes through some soil and strikes the rock, and the next goes through some soil and strikes the rock, do you know of any cases where, in addition to going through the soil that you have been through, where they have been into the rock?

A. No sir, not on false work.

Q. Not on false work?

A. No sir.

Mr. KEATON: Do you know of it on permanent work?

A. Well, if there is only two or three feet drive in very soft dirt——

Q. Well, if it was a ten foot drive?

A. Well, that would be sufficient.

Mr. KEATON: Is not it possible to go down and make a footing for the pile without driving the pile into the rock, could not you do that with machinery?

A. It is not customary or practicable.

MIKE FALLAHEY is the next witness called to the stand by the defense and gives the following testimony under oath:—

By Mr. MOSELEY:

Q. Who were you employed by on June 9, 1902?
A. McCabe & Steen.
Q. Where were you working?
A. On the South Canadian River.
Q. What were you doing there?
A. I was putting up false work.
Q. What position did you hold there?
A. Foreman.
Q. Foreman of how big a gang?
A. I should judge there was about thirty men.
Q. Foreman of a gang of 30 men?
A. Yes.
Q. What was the gang called; what did you do with that gang; what was their business?
A. Well, they were bridge men; I was putting in false work.
Q. Did that bridge scour,—wash out?
A. Yes sir.
Q. How long before June 9th was it that it was washed out, do you know?
A. Not exactly; it was along about the first, or about the
182 21st, I think.
Q. The 21st of what?
A. Of May.
Q. The 21st of May?
A. Yes.
Q. Were you there when it was washed out?
A. Yes sir.
Q. Was it in fact washed out, or what did happen to it?
A. Why the drift wood——
Q. What was the condition of it when you first saw it; I mean after it had become displaced or disturbed; describe it to the jury?
A. When I first saw it, it was drifted down the river in a curve, the drift——
Q. —how many bents?
A. Why, I should judge about 12 bents went out.
Q. Was the track still holding?
A. Yes.
Q Was the track off the bents, or on the bents?
A. It was on the bents.
Q. What was above the bents in the water?
A. Above the bents,—the pony bents.
Q. No, in the water above, up the stream, this drift?
A. Why, there was drift, logs and brush and grass.
Q. Much or little?
A. A big pile of it.

Q. What conclusion, if any, did you reach as to the cause of the trouble to that bridge on that occasion?
A. Why, the drift taken it out.
Q. What did you do with the bridge?
A. We cut it loose and let it go.
Q. What became of the drift?
A. It went down the river.
Q. How many bents, now, was that?
A. Twelve bents.
Q. Did you replace those bents or reconstruct them?
A. Yes sir.
Q. Did you have any superintendent?
A. No sir.
Q. Did you have any engineer?
A. Yes sir.
Q. Who was the engineer?
A. Why, Mr. —— I can't think of his name now.
Q. Named Grall, or some such a name as that?
A. Yes sir, Grall.
Q. Who was he furnished by?
A. By the company I suppose.
Q. I wish you would tell the jury just what he did with
183 reference to the work that you did there?
A. Well, he was the man that was in charge.
Q. Well, what did he do in that work; what was his part?
A. Well, sir, I was acting under his directions, driving piling and erecting the structure.
Q. Well, in driving the piling, what did he have to do with that now, for instance?
A. Well, he told me where to put them and when they were drove enough.
Q. Told you where to put them and when they were drove enough?
A. Yes.
Q. Would he stop your driving?
A. No sir, he was supposed to drive them to rock?
Q. Well, would you drive them until he stopped you, that's the porposition?
A. Yes sir.
Q. Now how many bents did you put back in there?
A. 12 bents.
Q. Which end did you begin at?
A. At the east end, the Oklahoma City end.
Q. And what was the size of the piling, would you say?
A. Well, I would judge that it ran from ten to eleven inches,—fifteen to sixteen at the but.
Q. What was the length of the piling?
A. Well, I could not say exactly what length; they were long piling.
Q. Oak piling?
A. Oak.

Q. How deep did you drive them?
A. Well, I should judge they ran from ten to eighteen feet.
Q. That is, you mean, including all twelve of the bents ?
A. No sir, they went deeper than that further out.
Q. Were the ones near the Oklahoma side deeper than those out in the middle or *vice versa?*
A. No sir, the further out the deeper they got.
Q. Were those bents driven to bed rock or not?
A. Yes sir, supposed to be—was my understanding.
Q. What do you mean by that?
A. That they were drove to rock.
Q. Well, you say "supposed to be" what do you mean by that?
184 A. Well, because they resisted the hammer which showed that they was on the rock.
Q. How long have you been in this kind of work, Mr. Fallahey, driving piles?
A. Since 1875.
Q. Can you tell when a pile gets to rock?
A. Yes sir, pretty well.
Q. Well, were those piles driven to rock or not?
A. That would be my judgment.
Q. How many piles did you have in a bent?
A. Five.
Q. What kind of caps did you have on them?
A. 12 by 12.
Q. And what did you have on top of that?
A. The pony bents.
Q. How were they built?
A. Four posts and a cap.
Q. What sized timber were they?
A. They were 12 by 12.
Q. Did you have any longitudinal stringers or braces between those bents, lengthwise of the bridge?
A. Yes sir, the stringers were placed in the centre.
Q. In the centre of what?
A. In the centre of the cap.
Q. What cap?
A. The sill on top of the piles.
Q. How many stringers did you have there?
A. Two.
Q. What size.
A. Seven by fifteen.
Q. How long were they?
A. Sixteen feet.
Q. Then did you go from the center of the sill on top of one bent to the centre of the sill on top of another?
A. Yes sir, and then would put them together at the end.
Q. Were they fastened to the sills on top of those bents or not?
A. Yes sir.
Q. How were they fastened?
A. Fastened with a drift bolt.

Q. Were there any stringers on top of the pony bent?
A. Yes sir.
Q. What sort of stringers were they?
A. Just stringers, they were fastened by packing blocks and bolted together.
185 Q. What do you mean by a packing block; do you mean by a packing block something like that?
A. Yes sir (illustrating) and sets down on the cap.
Q. Comes down below the level of the sill?
A. Yes, and then it is bolted through here and here and up here and here.
Q. Now, that is the way you drop it down the side in that shape?
A. Yes sir.
Q. So that the bottom of your packing block would drop below the bottom of the sill?
A. Yes sir.
Q. What do you call those, what stringers,—fixed that way?
A. The chad (?)
Q. Now, you had that on one side of the pony bent, what did you have on the other?
A. The same thing.
Q. And down below that, on top of the pony bents,—on the caps of the pile bents, you have two of those big stringers through the middle?
A. Yes sir.
Q. Would that, in your judgment, make a secure bridge?
A. Yes sir.
Q. Ah?
A. Yes sir.
Q. How were those pony bents fastened to the pile bents?
A. They were fastened by what you call a cleat or scab, two feet long that were set up on the side of the posts and bolted through the sill and post, with sway bracing on both sides, and bolted into the sill and cap.
Q. Now, in addition to those longitudinal braces that you had from cap to cap of the pile bents, had you anything else put on them?
A. Yes sir.
Q. What was it?
A. I had three by eighteens.
Q. How long?
A. Well, they ran from eighteen to twenty feet.
Q. How were they put on?
A. They were put on flat on these sills over the piles and laid by each other, and extended above the cap.
Q. Were they nailed?
A. They were spiked with three inch spikes by eight.
186 Q. Now, were you present on the morning that the accident occurred?
A. Yes sir.
Q. Were you there the day before?
A. Yes sir.

Q. This accident occurred on what day?
A. Monday morning.
Q. What had happened there the day before, on Sunday; did anybody pass over the bridge?
A. Yes sir, a train.
Q. What train was it?
A. I think it was the same engine,—I know it was the same engine and I think the same car.
Q. Which way was it coming from?
A. It was coming to Oklahoma City from Chickasaw.
Q. Was the water up or down on Sunday evening?
A. Well, it was down more than it was on Monday morning.
Q. Well, when did it rise?
A. It started rising between four and five o'clock Monday morning.
Q. What time did these people get out there with the train from Oklahoma City?
A. About eight o'clock or half past eight.
Q. Had you made any test of that bridge prior to that time before they got there on that morning?
A. Yes sir.
Q. What had you done?
A. Why, I had had a car loaded with a pump and boiler and pipe on it, loaded on this end of the bridge and pushed out over to the far end.
Q. About what weight of load would that make?
A. Well, I think it would be between 20 and 30 thousand pounds.
Q. Between 20 and 30 thousand pounds?
A. Yes sir.
Q. You pushed it from this side across to the other side?
A. Yes sir.—That is, without the weight of the car.
Q. You mean 20 to 30 thousand pounds in addition to the weight of the car?
A. Yes, in addition to the weight of the car.
187 Q. How long before these people arrived there was it that you pushed that car over?
A. Why, I don't think it had been over more than a half hour or three quarters of an hour?
Q. How did you push it over?
A. By hand.
Q. Did it have any effect upon the bridge that you could see?
A. No.
Q. What did you do with it?
A. Left it there.
Q. What was your purpose in doing that?
A. Why, I wanted to see that everything was all right, and make sure——
Q. What conclusion did you reach Mr. Fallahey?
A. That the bridge was all right.
Q. Why did you adopt that test; was that a usual or unusual test?
A. It is an unusual test.
Q. What is usually done?

A. I never tested a bridge, but I just done that for my own satisfaction.

Q. If the bridge had been insecure at that time, do you believe that that would have had any effect upon it?

A. Yes sir.

Q. When the train and engine arrived what happened?

A. Well, I asked for them to take a derrick car over for me——

Q. —*what I* minute. Did you have two tracks or one on the other side of the river?

A. Two tracks.

Q. And when the train arrived did you have anything standing on the side track?

A. Yes, a derrick car. We used it there working on the bridge.

Q. That is a car with a derrick on it?

A. Yes sir.

Q. Now what did you want done with it?

A. To take it over and get water at the tank on the west side of the river.

Q. The water tank is on west side of the river, and you got water on the derrick car?

A. Yes sir.

Q. And you told him to take that to the other side of the river?

A. Yes.

Q. And he hitched on to it?

A. Yes.

Q. And took it over?

A. No sir.

188 Q. Did he start to take it over?

A. Yes.

Q. Did he start to take it on this side or the other side?

A. The other side.

Q. And what happened?

A. One bent settled.

Q. What bent?

A. Bent No. 21, or the first bent on this side.

Q. Were they building a pier on this side of the river?

A. Yes sir.

Q. What did they have around it?

A. A coffer-dam.

Q. Was this pier No. 21?

A. Bent No. 21.

Q. Bent 21 between the coffer-dam and the land, that is, this side of the coffer-dam, or between the coffer-dam and the river?

A. Between the coffer-dam and the river.

Q. How far was it from the coffer-dam?

A. I should judge about six feet.

Q. You say it sunk?

A. Yes sir.

Q. How far did it sink?

A. About four inches.

Q. Now, if that was on rock how did it sink?

A. I can't account for it.
Q. What did you do with it?
A. I leveled it up and put on additional braces,—jimmied it up.
Q. What do you call jimmying it up?
A. Why leveling it up.
Q. How did you accomplish that?
A. By raising the track and putting in what is called Jimmies(?)
Q. That is what you call "jimmying" it up?
A. Yes.
Q. What are "jimmies"?
A. Why they are pieces of timber that you make in height, whatever the bridge sets——
Q. You didn't raise the bent, then, in any way?
A. No sir.
Q. Nor the caps of the bents?
A. No sir, I done it all from the surface, on the top.
Q. Just leveled up the caps to the top of the pony bents?
A. Yes sir.

Q. Well, did you make any further examination of the
189 bridge?

A. Yes sir, I examined the bridge.

Q. Did you see the plaintiff here, at that time, this man Wilson, who was fireman on that engine?
A. I seen him, yes sir.
Q. What was he doing then?
A. He was on the engine and I seen him also on the ground.
Q. Did he assist in jimmying up that bent there or doing anything with reference to it?
A. No sir, not that I know of.
Q. Well, after you got that straightened what did you do?
A. Why, we put the derrick car back on the side track.
Q. Why didn't you go on with the derrick car?
A. Well, I didn't want to keep it there; I didn't need the engine particularly——
Q. Well, what happened?
A. Well, they came on with the engine.
Q. Came on where with the engine?
A. Came on to the false work.
Q. What did they do that for?
A. Well, just to test it.
Q. Any other object?
A. And to get this car on the other side.
Q. Why could not it go over and take up the car when it got to it?
A. Well, they could.
Q. But you would lose the chance to test the bridge in that way, would you?

Objected to as leading and suggestive. Sustained.

Q. Now did anybody go over on the engine?
A. The engineer and fireman.

Q. Did they get over as far as that car?
A. Yes sir.
Q. What did they do when they got there?
A. Came back.
Q. Did anything happen to the bridge while they were going over after the car?
A. No sir.

Q. Did they bring the car over with them?
190 A. Yes sir.

Q. What did they do. Did anything happen to the bridge in coming back with the loaded car?
A. No sir.
Q. Where were you all that time?
A. Well, I walked across ahead of the engine until I got to the platform that was built at the far end of the false work near the west pier and stepped to one side and let the engine by and then walked back and examined the false work to see if everything was standing right.
Q. Did you go on the engine when you went over?
A. No sir, I walked just ahead of the engine.
Q. And watched the bridge?
A. Yes sir.
Q. Did you see any sign of its giving way?
A. No sir.
Q. That is, you walked ahead of the engine going over?
A. Yes.
Q. And ahead of the engine coming back?
A. Yes.
Q. Did you see any sign of its giving way coming back?
A. No sir, I examined it thoroughly and walked very slow and seen everything as I went over, and when I came to the end of the bridge, as the engine came back over, and stood on the up-stream side on the edge of the bank, and stood there with my eyes on the rails and followed her drivers right along to see if there was any settling, and there was nothing; so I decided that the bridge was safe.
Q. Now, they started back over there?
A. Yes.
Q. And what happened then?
A. They went on the fifth bent——
Q. The fifth bent from where?
A. From the east side.
Q. Well, now, let's see; you count the bents that were inside of the coffer-dam and call that the 5th bent?
A. Yes sir.
Q. On the river side of the coffer-dam?
A. Yes sir.
Q. Begin at the coffer-dam then to count the bents.

A. Yes, if you count to the fifth bent from the east *peir*
191 that would be bent No. 17.

Q. All right, the fifth bent from the east pier.

Q. That would be pier 17; then the bent that was right next to the east pier would be bent No. what?
A. Twenty one.
Q. That is the one that sunk, and that you shimed up?
A. Yes.

Mr. WELLS: We object to that as leading and suggestive.
(No ruling.)

Q. That was No. 21?
A. Yes sir.
Q. Now the next one was what number?
A. 20.
Q. And the next one was what number?
A. 19.
Q. And the next one what?
A. 18.
Q. And the next one?
A. 17.
Q. Now which one was the bent that first sunk with the engine?
A. It was No. 21.
Q. Oh, well, I am talking about after the train had started?
A. Why it was No. 17.
Q. How do you know that?
A. I was looking right at it.
Q. You can describe to the jury what you saw?
A. I was standing on the up-stream side of the bridge watching the engine as it went along, and I seen the piles kick——
Q. State that again?
A. As I looked the piles kicked towards the west, the Chickasaw side.
Q. Which ends of the piles went towards there?
A. Why the points, the bottoms of the piles.
Q. You saw the bottoms of the piles go towards the Chickasaw?
A. Yes sir.
Q. And what became of the tops?
A. They went down. And I hollered to look out.
Q. Did anything else transpire there?
A. The engine went into the river.
Q. Did any other piles give way?
A. I could not see any more; I saw those piles go and those was under the engine and the tender.
Q. Well, did any other bents give way?
A. Yes sir, all of them back.
Q. All of them back?
A. Yes sir, all of them back this way to 21.
Q. No. 17 went down then?
A. Yes.
Q. And 18 went down?
A. Yes.
192 Q. And 19 and 20 and 21?
A. Yes sir.

Q. Now what position was the engine,—what else went down besides the engine?

A. The engine and the tank.

Q. The engine and the tank, you call that the tender, don't you?

A. Yes sir.

Q. What position were they in when they went down?

A. Well, the engine had drifted about three or four feet out of line with the centre of the bridge, and was standing just about the same as it would stand on the bridge, level; and the tank was lifted from the back end.

Q. Where was the back end of the tender?

A. It was right on the coffer-dam.

Q. Was it on the coffer-dam?

A. Yes sir.

Q. How much of it was on the coffer-dam?

A. I don't know; I know it was resting on there.

Q. What became of bent No. 16?

A. Bent No. 16, why it lay towards Chickasaw, on the sill and the flat car was hanging over it.

Q. Then No. 16 did not entirely fall down?

A. No sir.

Q. I don't believe you stated exactly how the engine, after it started with the train of cars, how it carried the flat car; did it carry the flat car in the train of cars or did it carry it at the head of the engine?

A. At the head of the engine.

Q. Now, did you clean up that wreck?

A. Part of it.

Q. Did you get the piles up,—what you could—afterwards?

A. Why I got the piles that was lying next to bent 16.

Q. You got the piles out that had made bent 17?

A. Yes.

Q. In what position did you find them?

A. I found them with their heads lying towards the east.

Q. What do you mean by "heads?"

A. Where the sill goes on to the pile.

Q. Where did you find the points?

A. The points was to the west.

193 Q. Now, did you find the points,—in what relative position did you find the points, that is, with reference to bent 16, which didn't fall down entirely?

A. Well, the points had run past 16.

Q. The points of the piles that made bent 17 had run past the piles which formed bent 16?

A. Yes, sir.

Q. And I understood you to say that bent 16 was still in place?

A. Well, it was still in place, but it had been knocked over.

Q. The points of it were still in place?

A. Yes.

Q. Now, if I understand you, if that is bent 16 that way, you

found the points of the piles of bent 17 poked past the position that bent 16 was in?

A. Yes, sir. (Illustrates.)

Q. In a position like this (ills.)?

A. Yes, somewhat.

Q. Well, what did you infer from that, Mr. Fallehey?

Mr. KEATON: Objected to as incompetent.

Objection sustained.

Q. Was the rock upon which these bents—these various bents along there—rested, a level rock, or was it a slanting rock?

A. It was slanting.

Q. Which way did it dip or slant?

A. Towards the west.

Q. When you speak of the west you mean towards Chickasaw?

A. Towards Chickasaw, yes.

Q. Is that more west or more south?

A. I could not say.

Q. Well, that is the direction you mean?

A. That's the way I have always had it.

Q. Could the points of the piles of bent 17 get into the position in which you found them?

A. They could not.

Q. About what depth of soil had the piles in bent 17 been driven through before they got to the rock?

A. About eighteen feet.

Q. How deep was the deepest piles that you drove in there when you put them in?

A. Well, in that part or further on?

Q. Further on, the deepest one that you put in in renewing the bridge?

194 A. Well, I could not say exactly; they got deeper every bent; all the way from this bank, why they kept getting longer and deeper, all the way.

Q. How deep was the first pile next to the coffer-dam, through the soil?

A. It must have been at least ten feet.

Q. How high was the pile cap above the ordinary level of the water?

A. About eight feet.

Q. Do you know, Mr. Pratt?

A. Yes, sir.

Q. By whom was Mr. Pratt employed?

A. By McCabe & Steen.

Q. Was he out there every day?

A. Yes, sir.

Q. Do you know what duties Mr. Pratt performed in McCabe & Steen's employment at that time?

A. Why he was handling the trains,—is all I know of.

Q. Handling the trains?

A. Yes.

Q. What were the trains doing?
A. Why, just work trains, carrying materials for the construction of the road.
Q. Where would the trains carry material,—to what points?
A. Why all points along the line where construction was going on: for the building of stock yards and platforms, and ties and rails and bridge material.
Q. Now what was your position?
A. My position: I was foreman of that bridge gang.
Q. And Mr. Pratt had charge of the train service on it?
A. Yes, sir.

Mr. KEATON: Objected to as leading, suggestive and a repetition.

Q. Now, please state to the jury what the whole work consisted of briefly, Mr. Fallahey, that McCade & Steen were doing out there?
Q. Well, they were building bridges, laying track, putting up stock pens, platforms and water tanks.
Q. —what about section houses—I mean depots?
A. Yes.
Q. Building depots too?
A. Yes, sir.
Q. Any painting?
A. Yes.
195 Q. Well, who was in charge of the painting work, do you know?
A. Why a man named Dane (?).
Q. Was he under Pratt?
A. No, sir.
Q. Who was in charge of the water tank business?
A. A man named Gray.
Q. Was he under Pratt?
A. No, sir.
Q. Were you under Pratt?
A. I taken Gray's place in the water tank——
Q. —where you under Mr. Pratt's control and management and subject to him?
A. No, sir.

Mr. KEATON: Objected to as leading and suggestive.
The COURT: Don't answer so quickly.

Q. Well, who were under Pratt's control; what employés were under Pratt's control?

A. None that I know of, only the train men.

Mr. MOSELEY: That's all.

Cross-examination.

By Mr. WELLS:

Q. Who were you employed by, Mr. Fallahey?
A. McCabe & Steen.
Q. What particular person employed you?

A. McCabe & Steen.

The COURT: Well, who?

Q. Well, when you were first employed, who did it, McCabe & Steen, or who?

A. I was first employed by Mr. McCabe.

Q. Now, I understood you to say that throughout this bridge or trestle work that goes over the South Canadian there, that you drove each pile down to bed-rock?

A. Yes, sir.

Q. How long piles did you have out there?

A. Well, sir, I could not tell exactly, because I didn't keep any records of the lengths, the engineer done that.

Q. Did you have any piles as long as fifty feet?

A. Well, I don't think I had any as long as fifty feet.

Q. Or any piling as long as forty feet?

A. I think we did.

A. I think we did.

Q. You think then that the longest pile that you had there was about 40 feet, would you?

A. I don't know that I could say exactly what the longest pile was.

196 Q. Well, you don't think you had any considerable number more than forty feet in length?

A. Well, I don't know in regard to that.

Q. You were in charge of all of that work?

A. Yes, sir.

Q. And you cannot give now any more definite idea than you have given as to the length of the longest piles that you used on the work?

A. That was not my business; it was the engineer's, he told me what to drive and had them sent out there in the water, and I would not swear to a pile unless I had the length of it.

Q. Who was your engineer?

A. Mr. Grall.

Q. Did you make soundings there to determine how far down it was to bed-rock, where you drove these——

A. I felt rock with the jet, jetting these piles.

Q. How far was it in the deepest place down to bed rock.

A. In the deepest place, where?

Q. Along this bridge over the South Canadian River that you constructed for McCabe & Steen?

A. Well, there was a difference in all the bents as we went from this side west.

Q. Yes, but what was the deepest?

A. The deepest, I don't know exactly what the deepest piles was.

Q. About what was the deepest?

A. I remember particularly right along where these bents are, that it was about 18 feet.

Q. About what was the deepest place there that you found down to bed-rock?

A. Well, about 40 feet,—was supposed to be.

Q. And you tell this jury that you drove piles on that bridge 40 feet into the quicksand?

A. No, sir, I didn't say that I drove piles forty feet.

Q. You said that you drove them to bed rock.

A. On bent No. 17?

Q. No, all along the bridge?

A. No, sir.

Q. Have not you testified that you drove each pile on that bridge to bed rock?

197 A. No, sir, I didn't drive all the bridge.

Q. Well, there was a considerable part of that bridge where you drove the piling down into the quicksand that didn't reach to bed rock?

A. That was further on.

Q. Now, starting from the north or east, the side toward Oklahoma City, starting in at this coffer-dam and running toward Chickasaw, on how many of those bents did the bottom of the piles touch bed rock?

A. I should judge there was about eight, eight I think; it was eight or nine.

Q. That would be a distance then of about 120 feet, counting up from the coffer-dam?

Mr. MOSELEY: That is a matter of calculation.

Objection sustained.

Q. Now then, those bents were 16 feet apart, the centres?

A. That is what they were supposed to be; I never measured them; that is what the engineer measured them for?

Q. Starting in at the south end of the coffer-dam, about how far was it down to bed rock there?

A. At the south side of the coffer-dam?

Q. Yes, or the west side,—the side toward Chickasaw?

A. Ten feet.

Q. To the bed rock?

A. Yes, sir.

Q. Now the bed rock sloped toward the west or south, that is toward Chickasaw?

A. Toward Chickasaw, yes, sir.

Q. The bed rock sloped at the rate of about two feet going down to three feet going forward, did it not?

A. Well, I could not exactly say that.

Q. Well, didn't it fall or slope about eight feet in going twelve feet where the pier was put in on the north side of the river?

A. I rather think there was.

Q. And as far as you know the slope of that bed rock kept at about the same slope for quite a distance?

A. Well, I don't know that it did; I would suppose that the rock was sloping from the soundings of that pier and the far pier.

Q. Now the last piling that you drove the bed rock, how

198 far was it driven into the sand?

A. Eighteen or 20 feet.

Q. Eighteen or 20 feet then was the furthest that you drove any of the piling?

A. Well, no, sir, I drove some piles further on out than those bents.

Q. Further out?

A. Yes.

Q. I want to know what was the furthest that you drove any of the piling, the deepest.

A. The deepest?

Q. Yes, any part of the bridge?

A. Well, sir, I don't remember what the longest piles was from there out; the first piles I kept pretty good track of them because I could reach them from the shore, but after they got further along, they were bringing them out with boats, and I could not see them until they settled them down in the sand.

Q. Now, you said on your direct examination, with reference to the construction of this bridge generally, that you were supposed to drive the piles to rock, and that that was your judgment as to what you did?

A. Yes, sir.

Q. You never referred, in saying that, to any particular part of the bridge, did you?

A. To a part?

A. Yes, did you mean that statement to apply to the entire bridge?

A. No, a part.

Q. Did you help to construct the original bridge that was there?

A. No, sir.

Q. Then you have reference only to the part that the water had washed away?

A. Yes, sir.

Q. How many bents was there of that?

A. There was six.

Q. Where did they commence, at the coffer-dam?

A. They commenced at the coffer dam on the east side.

12 M.—Court will stand adjourned until 1:30 this afternoon.

1:30 P. M.—Court convened pursuant to adjournment, and the trial of the above entitled cause was proceeded with as follows:—

Same witness recalled.

Q. Did you construct the original bridge at this place?

A. No, sir.

199 Q. How many bents of this bridge had been taken out by this first washout?

A. Twelve.

Q. Which bents was it?

A. The first bents, up to bent 21 on this side, that was the first washout.

Q. Then you began with No. 20 and ran up to No. 8; that had washed out, from 8 to 20?

A. I don't remember; I put in 12 bents.
Q. No. 20 was the first one washed out wasn't it?
A. Yes.
Q. And the next one was 19?
A. Yes.
Q. And so on,—enough to make 12 bents?
A. Yes sir.
Q. Well you say that seven bents were washed out at the time of this accident?
A. Seven?
Q. Well, six or seven?
A. Yes, I put six bents back.
Q. After the accident?
A. Yes, after the accident.
Q. And you put back 12 bents after the washout?
A. Yes sir.
Q. Now you saw the six bents that went out at the time of the accident?
A. Yes sir.
Q. Those were north of the bents that went out at the time of the washout, were they not?
A. There was five of them there.
Q. Now in all of those bents that you put back, you put the piling down to bed-rock, did you?
A. Yes sir, that was my judgment.
Q. So that commencing at No. 21 and running 12 bents south, they were all down to bed rock?
A. No sir, I didn't put in No. 21.
Q. Well, commencing with No. 20?
A. Yes sir.
Q. And running from that 12 bents south, they were all down to bed rock?
A. Yes sir,—well I cannot say about the 12th bent.
Q. Eleven of them were?
A. Well, the 11th bent; I wasn't at the driver exactly all the time.
Q. Well, do you think that you drove any of those piles more than 18 feet penetration?
A. Yes sir.
Q. How much more?
A. Well, I could not say, because I never measured the piling.
Q. Did you drive any of them as much as 25 feet?
A. Well, I would not say that.
Q. You would not say that you did?
A. No sir.
Q. You did not measure how far you drove them?
A. No sir, I was looking more at the driver.
Q. You would not say that you drove any of them more than 18 feet?
A. No sir.
Q. Now in putting those 12 bents back after the washout, you used

the plans and specifications that were prepared by the chief engineer, up the road?

A. Yes sir.

Q. And you put them back according to those plans and specifications?

(No answer.)

Q. They were the same plans and specifications that had been used to build the bridge in the first place?

A. Yes sir.

Q. And after the washout the structure was rebuilt along the same lines identically that it had been built in the first place?

A. Well, only one change on the bracing.

Q. How is that?

A. There was one change on the bracing.

Q. What was that?

A. It was 2 by 10's run along the piling right under the cap and bolted through.

Q. How was the change put on, additionally?

A. Yes sir, additional-y.

Q. And that was the only addition made to the plans?

A. Yes sir.

Q. Did those plans specify how deep the piling should go?

A. Well, I could not say as to the penetration, what it called for.

Q. But your idea was to put it down in each case to bed rock?

A. Yes sir, to satisfy the engineer.

Q. Now was it to put it down to bed rock, or was it to satisfy the engineer?

A. Well, until he said "stop."

201 Q. Was this engineer there at the time of this accident?

A. No sir.

Q. Was he there that day?

A. Yes sir.

Q. What time in the day?

A. I should judge it would be about an hour and a half after the accident.

Q. Did he have anybody representing him in charge there at that time?

A. He had an inspector there but he didn't represent him.

Q. Who was the inspector?

A. I forget his name.

Q. Who was he representing?

A. I don't know; I considered him as inspector; he was keeping tab on the piles and recording the penetration and the number of loads and everything.

Q. Was he there at the time of the accident?

A. Yes sir.

Q. Did he have anything to say about fixing it up?

A. No sir.

Q. Or fixing it before the accident?

A. No sir.

Q. You had that in charge entirely?

A. Yes sir.

Q. Now this morning of the accident, I believe you said this train got down there about eight o'clock or a little after?

A. Or 8:30 sometime, that was my judgment.

Q. And they started the engine across to get this car, or they started the engine across with some kind of a derrick car in front of it?

A. Yes sir.

Q. What was that done for, to get water?

A. To get water, yes sir.

Q. They were going clear across to get water?

A. Yes sir.

Q. How far had they got out on to the bridge when you first noticed there was anything wrong?

A. They had got the trucks next to the engine out on bent No. 21.

Q. Well, just explain to the jury what took place then?

A. Well, the bridge settled, went down?

Q. Down?

A. Yes.

Q. It didn't go sideways?

A. No sir.

Q. It simply went down?

A. Down.

202 Q. Well, they came back?

A. The engineer reversed the engine and came back.

Q. As soon as it went down?

A. They came back when I told them to come back.

Q. Well, do you know how it came to settle down then?

A. No sir.

Q. Did the piles remain in an upright position or were they slanting?

A. They looked to me in an upright position.

Q. Now if they had been straight with those piles resting on a solid rock below, they could not have settled, could they?

A. I could not say what the bottom was.

Q. But they could not have rested on a solid rock. If they had been resting on a solid rock, the piles might have bent sideways but they could not have been pushed down, could they?

A. I could not say as to that.

Q. But you are positive that at that time the piles pushed down?

A. Yes sir.

Q. And you think that they still remained in a perfectly perpendicular position?

A. Yes, I looked at them and examined all of them.

Q. You examined them and found that they were still perpendicular?

A. Yes sir.

Q. So that the giving at that time that caused the engine to come back must have been straight down?

A. Yes sir, straight down.

Q. That could not have been caused by the piles slipping off a sloping rock, could it?

A. Well, there could be such a thing.

Q. The piles could not remain upright if the bottom was solid?

A. Why not if they slipped under it.

Q. Well, if they slipped enough to lower the engine a couple of inches or so, the piles would not remain perpendicular would they?

A. Not if they slid on the rock, they would not remain perpendicular.

203 Q. Now about how much slant was there to this rock?

A. Well sir, I could not say.

Q. How much at the time that this engine was on, and it went down, did the track settle?

A. About four inches.

Q. Four inches?

A. Yes sir.

Q. Now, in repairing that you fastened a cable on some way, and had the engine pull it, didn't you?

A. Yes sir, I put a cable on——

Q. Just explain to the jury how that was done?

A. I put it on to act as a brace.

Q. Now then, you fastened one end of the cable to the bridge,—where?

A. On the sill at No. 21.

Q. On the sill?

A. Yes.

Q. That is the superstructure that is built up over the pony bents?

A. It is the top of the piles.

Q. Between the pile proper and the pony bent?

A. Yes.

Q. You fastened the cable around there, then where did the cable run to?

A. I took it up and took a strain on it with the engine.

Q. Now which way did the engine pull, that is, which way would the power be applied to the bridge; would it be pulling straight back?

A. Yes sir.

Q. You did not get it hitched to a tree out to one side so as to have it pull sideways?

A. No sir.

Q. You simply had it pull straight back on the piling?

A. Yes sir.

Q. There was no lever or anything between the engine and the place where the cable was fastened to the bridge?

A. No sir.

Q. Nothing to change the direction of the pull?

A. No sir.

Q. Then the pull of the engine would tend to pull this part of the bridge directly toward the engine?

A. No sir, it was simply to take up the strain on the cable, is what I done it for,—to straighten it up.

Q. You didn't do that to fix the bridge?

204 A. No sir, it was in a position to help to strengthen the bridge.

Q. So you put that cable on and simply had it pulled tight with the idea of having it there as an additional strength or support to the bridge?

A. Yes sir.

Q. The cable was not put on for the purpose of moving any part of the bridge?

A. No sir, no sir.

Q. Did you leave the cable there?

A. Yes sir.

Q. What was the end fastened to that had been tied on to the engine?

A. It was fastened to the piles.

Q. Back further north?

A. No sir, it ran at an angle up through the bridge; I took a chain and put it on to the cable and then put a pair of blocks there and hauled it to make it tight.

Q. Now then, after that had been done was anything else done in the way of repairing the bridge or strengthening it?

A. Yes sir.

Q. What?

A. I put on additional three by tens.

—. Where?

A. Across the pit.

Q. What pit is that?

A. This pier.

Q. No. 21, do you mean?

A. From 21 to the second bent on the permanent structure.

Q. Where was the permanent structure?

A. There was two bents this side of the pier, of the permanent work.

Q. The north side?

A. Yes, what I call east.

Q. Well, that is toward the Oklahoma City side?

A. Yes.

Q. Did you do anything else in the way of strengthening or fixing the bridge?

A. No sir, not any more than that.

Q. Now, Mr. Fallahey, you put these braces on and put this cable on because without them you did not think the bridge was safe, didn't you?

A. No sir. I put them on to use the best precaution I could——

Q. —Well, as a matter of fact, you knew from the fact that the engine had gone on a few minutes before that it wasn't safe then, didn't you?

205 A. No sir, it is a common thing for a bridge to sink.

Q. When the lower end rests on rock?

A. Whatever it is.

Q. Now after you had fixed this up did you tell them that it was all right now?

A. Yes sir.

Q. Told who?
A. I told Mr. Pratt.
Q. What did you tell him?
A. I says "It is all right."
Q. Why did you tell Mr. Pratt?
A. Because I supposed he was the man in charge of the train.
Q. How is that?
A. In charge of the train.
Q. Didn't they have a conductor there?
A. Yes sir, I also told the conductor.
Q. And also told the engineer?
A. No sir.
Q. Did you say it in his presence?
A. Well, I could not say to that.
Q. But when you got it fixed, or when you thought it was all right you told Mr. Pratt?
A. Yes sir.
Q. Then they took the engine and went out on the bridge after this car?
A. Yes sir.
Q. Now did they go out in order to bring the car in or in order to test the bridge?
A. Well, both.
Q. Well, it wasn't primarily to test the bridge?
A. Yes, and also to get the car back.
Q. Did you ask them to test the bridge?
A. I went ahead of them; I didn't ask them to test the bridge but I told them——
Q. You did not suggest to them in any way that you thought it best to test the bridge?
A. No sir, I didn't suggest that.
Q. Now, had you been making a test of the bridge, the engineer and fireman would not have gone on to it with the engine would they?
A. Well sir, I could not say to that.
Q. Well, you don't test the strength of a bridge by inviting people to go across, out on to the bridge to see whether it falls with them and kills them, do you?
A. No sir.
206 Q. If you were making it as a test you would send the weight out in such a shape that if it did fall no person would be injured, wouldn't you?
A. Well, I had already run this car across and I was satisfied.
Q. That was before the bridge showed that it would give way under an engine?
A. The engine wasn't out, it was a derrick car.
Q. Is that heavier than an engine?
A. No sir.
Q. Then notwithstanding the test that you had made that morning you knew that an engine would not go over there without the bridge giving down, didn't you?

A. Well, no, I didn't know; I saw it settle and I ordered it back until we could level it up.

Q. Now when it settled down those three or four inches, did you get it back up again?

A. I surfaced it from the top.

Q. That is, you put some blocks beneath some of the superstructure, between it and the piles?

A. No sir, no sir, I didn't; I surfaced it up under the rails and under the ties, that was spiked to the rail; it came up under the rail; I shoved timbers under it to make it as solid as solid ties.

Q. That is you lifted it so that the top of the track and the iron would be right where it was before?

A. Yes sir.

Q. And the piling and the pony bents and the superstructure was all of it pressed down some three or four inches?

A. Yes sir.

Q. How long had you been working for this construction company at the time of this accident?

A. What construction company?

Q. Well, you know, McCabe & Steen?

A. Yes.

Q. How long had you been working for them?

A. I had been working since June 1897, I think it was, for McCabe & Steen.

Q. How long had Mr. Pratt been working for them?

207 A. Well, sir, I could not say; I have known Mr. Pratt had since '97 or '98, off and on.

Q. You have been with them a number of years?

A. Well, I have been with them that time.

Q. And what did you say his position was?

A. His position?

A. Yes?

A. Why my understanding was that he was over the train men.

Q. How many trains did they have?

A. Well sir, there was only material cars out——

Q. How many trains did they have?

A. Why the had four engines at that time.

Q. And your understanding was that all that Mr. Pratt had to do was just to superintend the running of those four engines?

A. Yes sir.

Q. And did not have anything to do with the bridge work?

A. No sir.

Q. That was an entirely a separate department of the business?

A. Yes sir.

Q. He didn't have anything to do with employing hands in your department?

A. No sir.

Q. Who did employ the hands in your department?

A. Why, I did.

Q. Were you superintendent of the department or was there any man in that department above you?

A. Well, there was nobody above me that I know of only McCabe & Steen.

Q. Were your duties and the duties of the men under you in any way connected with Mr. Pratt or the men under him?

A. None whatever that I know of.

Mr. WELLS: That is all.

Redirect examination.

By Mr. MOSELEY:

Q. Mr. Fallahey, you say, in putting up the structure after the first washout, you added one boards or two boards, three by ten inches, bolted on to the piles?

A. Yes sir.

Q. Under the cap.

A. Yes.

Q. What did you do that for?

A. Why it was to guard against drift; they had found out
208 in the first bridge that big logs had come down and heavy drift had broke the piling in on the up stream side, and this was put on as an extra precaution against the drift.

Q. Then you were protecting the second construction against the drift?

A. Yes, sir, against the drift.

Q. Was there any other precaution that you had taken or pretended to take in the second construction against the drift?

A. Why our whole aim was to make the bridge clear of drift and hold it; drift is what had taken the first one out, and what I did was principally to secure it against drift.

Q. Well, did you se-ceed in keeping this second structure clear of drift?

A. Yes and I also held the engine on the up stream side, with ropes, so that if big logs came I could pick them out of the water so as to cut them and let them go through.

Q. You worked them so as to protect this bridge from the thing that brought disaster to the first one?

A. Yes sir.

Q. Now had any drift accumulated against this second wo[illegible]

A. No sir.

Q. None had accumulated at that time?

A. No, of course some would come there but we would get it ou as soon as possible.

Q. But it had not been permitted to accumulate?

A. No sir.

Q. This bridge then had not been weakened by drift?

A. No sir, it had not.

Q. Mr. Fallahey, pier No. 2, was on the south side of the rive wasn't it? Well I don't care.

A. Well, I don't know——

Q. How far did the trestle extend beyond the pier on the oth side of the river?

A. Well, I say Judge, I had nothing to do with the work over there but I should judge about 60 or 70 yards—the permanent work.

209 Q. What distance apart were those bents?

A. I could not say, I think fourteen or fifteen feet.

Q. Now, when the water was up did it overflow that bottom?

A. Some.

Q. Calling then that roughly 600 feet and adding 300, which would be 900 feet when the water was brought up there, in that neighborhood, when the river was up?

A. Yes sir.

Q. Now, on this side, how far did the trestle work come on this side of the pier that was on this side of the river?

A. There was two bents, just one length.

Q. Now when the water was up would it come out at this pier that was on this side of the river?

A. I don't think it would unless it would be an extremely high rise.

Q. Mr. Fallahey, in addition to the braces, additional braces, that you put on the pile bents, were there any other braces on the pile bents?

A. Yes sir.

Q. What kind of braces were they?

A. Well, they were three by ten on the water line, one on each side of the bent——

Q. Parallel with the water?

A. Yes, with the river.

Q. With the surface of the water?

A. Yes, and then there was X bracing that ran up on one side of the bent and then reversed on the other side, and coming the other way;—what we call X bracing.

Q. Was that on the work that you put up too?

A. Yes sir.

Mr. MOSELEY: That is all.

Recross-examination.

By Mr. WELLS:

Q. There is one thing that I overlooked. There is now a permanent structure or bridge there built upon pier across this place, is there?

A. Well, I suppose so, I have never seen it.

Q. Well, have you seen the piers?

A. No sir, I have never seen either one of the piers. I know about where they are located.

210 Q. How many of them is there, of the piers?

A. Two is my understanding.

Q. Just simply one on each bank of the stream?

A. No sir, one is practically in the bank, on this side, and the other one is out in the river, on the other side.

Q. About the middle of the stream?

A. No sir, I would not think it was.
Q. Towards the south bank or towards the north bank?
A. Well, it is what I call west, about 300 feet is my understanding when I was there; it was a 300 foot span.
Q. That single span was 300 feet?
A. Yes sir.
Q. There was no pier in the middle of that 300 feet?
A. No sir.
Q. Then one pier is put in right near the water on the north bank, or the east bank you would call it?
A. Yes sir.
Q. Then about — feet from that is the second pier?
A. Well, that is what I was informed.
Q. Well, where do these bents commence numbering from?
A. Well, I suppose they commence from the west.
Q. From that west pier or still west of it?
A. The west pier.
Q. Then they number east from the west pier, the first one would be one, and then each 16 feet would be a number higher?
A. Yes, sir.
Q. Now immediately after this accident how were the piles standing on bent No. 16, that is, were they perpendicular or were they twisted over one another?
A. Why, as I stated before, they were bent in with the cap and the car hanging over.
Q. Bent which way?
A. They were shoved towards Chickasaw,—towards the west.
Q. Very much or just slanting a little?
211 A. Well, they were considerably.
Q. Were the piles of bent No. 15 also bent over towards Chickasaw?
A. No sir, that part of the structure was all right.
Q. They were standing perpendicular?
A. Yes sir.
Q. Now from about the bottom of bent No. 16 you took out the piling that had been used for bent No. 17?
A. Yes sir.
Q. They were in there with the bottom of the piling towards Chickasaw?
A. Yes sir, that was the range I think.
Q. And they overlapped some of the piling of No. 16?
A. A brace comes across the five piling like that at the water line, and the brace was lying that way, and the piles was in like this, this way, and I took the derrick——
Q. Were those piles that you took out, were they down in the water?
A. Why they were ranged down in the water.
Q. Well, what had been the bottom of them was still in the water?
A. Yes sir.
Q. And what had been the top was still lifted above the water?

A. They was lifted like that (ills.).
Q. How long after the accident was it that you took out the piling?
A. Right away.
Q. Was it taken out, if you know, before or after the photograph was taken?
A. It was taken out before that car was unloaded,—as soon as that car was loaded.
Q. The engine was in the place shown at that time, as it was immediately after the accident, wasn't it?
A. Absolutely so.
Q. Now, this way is down stream?
A. Yes sir.
Q. Where was the piling with reference to where the picture shows the engine?
A. Right out ahead here.
Q. This was up stream was it?
A. The piling was sticking about here some place?
A. Yes.
Q. This is one of the piles of No. 16?
212 A. That is one of the piles of No. 16.

V. E. STEEN was the next witness called by the defense, and testified in his own behalf as follows:

By Mr. MOSELEY:

Q. Mr. Steen, are you an officer of the McCabe & Steen Construction Co.?
A. I am.
Q. What position do you hold?
A. Vice president and treasurer.
Q. Are you one of the original incorporators of that company?
A. Yes sir.
Q. Did the plaintiff Mr. Wilson work for that company at any time?
A. No sir.
Q. Was Mr. Wilson ever in the employ of the defendant in this case?
A. No sir.
Q. In whose employ was Mr. Wilson?
A. McCabe & Steen's.
Q. Who were McCabe & Steen.

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial to the issues.
(Discussion).
Objection sustained. Exception by defendant.

Q. Did the McCabe & Steen Construction Company——
—. Well, he was answered that it did not employ this man, that he never was in its service.
The COURT: He said that.

Q. Now who did the work Mr. Steen on this railroad from here to Chickasaw?

A. McCabe & Steen assigned this contract on the 23rd of July to the McCabe & Steen Construction Company, but up to that time McCabe & Steen were assigned to it by Johnson Brothers.

Q. The 23rd of July of what year?

A. 1902.

Q. Well, whose signature is that first name there?

A. F. W. McCabe. That is his own signature.

Q. Whose signature is that below?

A. Mine.

Q. And whose signature is that one there?

A. Mr. McCabe's.

Q. What position did he hold in the construction company?

213 A. President of the construction company.

Q. Now is the date borne by that instrument the correct date of the transfer of this contract?

A. Yes sir.

Q. Whose signature is that on the instrument below?

A. Johnson Brothers signed by B. F. Johnson.

Q. Now what did this transfer here have reference to?

Mr. KEATON: Objected to as incompetent, the paper being the best evidence.

Sustained.

Q. Mr. Steen, this instrument dated July 23rd, which I offer in evidence or will in a moment,—what contract does that have reference to?

A. The contract that is attached to that.

Q. What contract is that?

A. Our work on the Oklahoma City and Western.

Q. Is that — contract under which this bridge was being constructed and you were doing this work that has been testified about here?

A. Yes sir.

Mr. MOSELEY: Now, if the court please,—this is just to save the record,—I am going now to offer the contract of transfer. It reads: "For value received, we hereby assign——."

Mr. KEATON: We object to that if it is offered for the purpose of attempting to show that the McCabe & Steen Construction Company, a corporation is not a party defendant to this action, because it is not within the issues, and the pleadings on behalf of the defendant practically admitting and alleging that the defendant had plaintiff employed and that he assumed the risk of his injury.

(Discussion).

Mr. MOSELEY: If the court please we offer this to show that the plaintiff was not employed at that time by the McCabe & Steen Construction Company, the defendant, and that the defendant was not at the time alleged in the petition performing the work alleged. The said contract is copied in this case made at page 186 and marked "Exhibit E."

214 The COURT: And to show I suppose, that the defendant is not liable?

Mr. MOSELEY: Yes, and to show that the defendant is not liable. (Discussion.)

Objection sustained and defendant excepts. Thereupon court withdrew from the consideration of the jury the testimony of the witness Steen to the effect that the plaintiff Wilson was never in the employ of defendant, to which defendant excepted.

Mr. MOSELEY: We will ask the court to permit us to amend our pleadings so that this defense may be put in. I offer to support the application with an affidavit to the effect that I drew this answer and sent it here to be filed, and that at the time I drew it and had it filed I had no knowledge of this defense or of this fact, and did not know other than that the McCabe & Steen Construction Company did this work and had this original contract, and that it was only upon enquiry into the nature of the contract that they had, that that was made known to either myself or to any other attorney in the case.

The COURT: Mr. Steen, I want to ask you a question or two, who are the stockholders in this McCabe and Steen Construction Company?

A. McCabe and Steen and Posey (?) Jameson and one other man, I have forgot his name.

By the COURT:

Q. What is the capital stock?
A. $25,000.
Q. All paid up?
A. Yes sir.
Q. How much of the stock did you and McCabe own?
A. Ninety six per cent of it.
Q. And four per cent. is owned by other gentlemen?
A. Yes sir.
Q. Were any of those other gentlemen interested in the co-partnership of McCabe & Steen before?
A. No.

The COURT: I don't think that you have made any showing yet that would justify an amendment; of course you may be able to make a showing, I don't know, but there is nothing before the court now that would justify——

215 Mr. MOSELEY: Well, will the court give us time to prepare an application and an affidavit, or will the court consider them as filed?

The COURT: What do you gentlemen say as to McCabe & Steen coming in at this time?

Mr. MOSELEY: Well, I think they would not come in.

The COURT: I will give you 20 minutes gentlemen.

2:30 P. M.—Recess for 20 minutes.

Whereupon, application to amend answer of defendants is presented to the court, and argument made thereon, which was over-

ruled by the court; which ruling of the court is excepted to be the defendant. Said application was in writing and is attached as an exhibit hereto marked Exhibit "D" and is found at pages 184-5 of this casemade.

216 Whereupon, the same witness being recalled, the examination was proceeded with as follows by the counsel for defendant:

Mr. MOSELEY: Now, the only thing the admission of which has been refused is the contract.

The COURT: Yes. If the only purpose for offering the contract is to show that the McCabe & Steen Construction Company did not employ him, (plaintiff) and that he was not in their employ at the time the accident occurred.

Mr. MOSELEY: We now offer the contract to show that the McCabe & Steen Construction Company did not have this work in charge, and were not performing this work at that time, building the bridging or the road from Oklahoma City to Quanah, Texas.

Mr. KEATON: We object to that for the same reason.

The COURT: I will admit this instrument; I think it is competent.

To which ruling of the court the plaintiff excepts through his counsel.

(The instrument referred to being the transfer and assignment.)

Said instrument is read to the jury by Mr. Moseley, and a copy of the same is attached to this record and is marked Exhibit "E" and is found at page 186 of this case made.

Q. Mr. Steen on June 9th, 1902, was the McCabe & Steen Construction Co. performing any contract for the construction of a road from Oklahoma City to Quanah, Texas?

A. No sir.

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial under the issues.

Objection sustained. Defendant excepts.

Q. Did the McCabe & Steen Construction Company have any contract for the construction of this bridge over the Canadian River, which has been testified about, at that time?

Mr. KEATON: Objected to as above.

The COURT: Of course this is all offered for the purpose of showing that he was not in their employ at the time?

217 Mr. MOSELEY: No sir, it is not; we offer this for the purpose of showing that they did not perform that contract, and that they didn't have that contract, and for every other purpose except for the purpose of showing that this man was not in their employ. I understand, your Honor, that the ruling is that we cannot show that——

The COURT: You cannot show that he was not in their employ.

(Court reads portion of answer.)

The COURT: Judge, I believe they have a right to show who was building that road, not for the purpose of showing that he was not

in their employ or to get away from any of their admissions, but from the fact that somebody else might have been building that bridge; that might be a circumstance for the jury to consider in determining the degree of negligence of this defendant. They don't admit that they were building that bridge. They admit that he was in their employ; that is all they admit.

(Discussion.)

Objection overruled. Plaintiff excepts.

A. The witness answers no.

Q. I will ask you further on this question: Was this man, Pratt, in the employ of the defendant in this case?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, for the reason that, under the issue, that is admitted.

The COURT: Let me have that statute for a moment. (Reads.)

Objection sustained. (Discussion.) Defendant excepts.

The COURT: Gentlemen, I will be very frank with you and say that I do not believe that this is a general denial, under our statute, and under the recent decisions of our own supreme court.

(Discussion.)

Mr. MOSELEY: You- Honor, I ask to amend by striking out
218 the words "in the manner and form as therein set forth."

Mr. KEATON: Well, I certainly object to their being permitted to do that.

(Discussion.)

The COURT: What is the question?

Question repeated by stenogprapher.

The COURT: The objection to the question is sustained.

Defendant excepts.

Mr. MOSELEY: Now, we ask the court to permit us to amend the general denial by striking out the words, "—in the manner and form as therein alleged."

Mr. KEATON: To which the plaintiff objects. As far as the general denial being sufficient to permit the defendant admitting that it is the proper defendant, and to raise further issues as far as it not being guilty of any negligence, admitting that it was the defendant and was doing the contracting work there, why we don't care anything about it; but we do object to their being permitted to amend their answer in any way so as to raise the issue that this defendant is not the defendant with whom the plaintiff contracted and who was doing this work.

The COURT: Well, I do not believe that the answer as it stands now charges that, as I said before. I think that they can raise that though, by a general denial.

Mr. KEATON: Well, we object to any amendment.

The COURT: Of course I do not believe that the answer amounts to a general denial as I said, and there are only one or two issues that could have been tried under that answer, and counsel have gone ahead and tried a great many issues. The court would only be too glad to permit both sides to amend the pleadings to cover the whole

of the issues and settle it in this case. I haven't any doubt but what you thought it was a good general denial.

Whereupon the court announces his decision to neither permit nor deny the defendant the permission sought to amend its
219 pleading at this time.

The COURT: We will go ahead now and treat this answer as a general denial at this time, and will reserve my ruling on your motion until I see further; I will fix the terms later.

Mr. MOSELEY: I understand the court to rule on this question as to whether or not Mr. Pratt was in the employ of the defendant——

The COURT: I sustained the objection to that.

To which ruling the defendant excepts.

Q. Was Mr. Fallehey in the employ of the defendant at that time?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial under the issues; they are estopped from claiming that he was not under the issues.

Objection sustained. Exception by defendant.

Q. Mr. Steen, did McCabe & Steen have a contract for the construction of the road from Oklahoma City to Quanah?

A. Yes sir.

Q. What part of that work were they to perform under that contract?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

Overruled. Plaintiff excepts.

Q. State briefly what work you performed?

A. Track-laying, pile driving, bridging, building depots, water tanks, coal sheds, round houses, putting in road crossings and cattle guards, and, in fact, work of all kinds, including signs and posts and whistling posts, and finishing up the work entirely in the way of buildings.

Q. Did that include making the grade?

A. No.

Q. What else did it include besides what you have stated?

Objected to as incompetent, irrelevant and immaterial.

220 A. There was a good many things that we had nothing to do with.

Q. Name the things that you did.

A. I gave them.

Q. I did not catch it all.

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception. Further objected that it is a repetition.

A. Pile driving, bridging, track-laying, surfacing the track, erecting the depots, water tanks, section houses, out buildings, cotton platforms, stock yards, round houses, coal shutes, signs and posts and

cattle guards, road crossings, and the furnishing of all the materials for that work, except cross ties and steel.

Q. Now who had charge of the bridge gang?

Mr. KEATON: Objected to as incompetent.

Overruled. Exception.

A. Martin and McCabe were sub-contractors under us for the bridging.

Q. Did you have a bridge gang yourself?

A. Yes.

Q. Who had charge of it?

A. Mr. Fallehey.

Q. The man who was on the witness stand?

A. Yes.

Q. What was his authority?

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. He was foreman of the gang, or anything that we had for him to do.

Q. Under whose direction was he?

A. Mr. McCabe's and myself, whichever of us happened to be there.

Q. Who had charge of your depot building?

A. Brown & Shaw.

Same objection. Overruled. Exception.

Q. Who had charge of your water tank building?

Same objection. Overruled. Exception.

A. It started out with a man named Gray, and then another man named Dislocamp had charge. Mr. Fallehey put up one or two tanks, perhaps.

221 Q. Who had charge of the painting?

A. E. A. Dahne.

Q. Did you move trains on this work?

A. Yes sir.

Q. Who had charge of the moving of your trains?

A. Jim Pratt.

Q. Who had charge of the train men?

A. Jim Pratt.

Q. Now were those parties that you have mentioned under each other or under Mr. Pratt?

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. They were under no particular person at all except either McCabe or myself.

Q. Did Mr. Pratt have any authority with reference to the bridge building?

A. Not a bit.

Q. Or the depot building?
A. No sir.
Q. Or the water tanks?
A. No sir.
Q. Or the painting?
A. No sir.
Q. What was his authority?

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. Mr. Pratt was foreman of the train men, had charge of the train service.
Q. Did he have authority to discharge and hire the train men?
A. Yes sir.
Q. Did he have authority to hire and discharge men in the bridge department?
A. No sir.
Q. Did he have any authority with reference to the construction or repair of the bridge over the Canadian River?
A. No.
Q. Are you a practical railroad man, Mr. Steen?
A. Yes sir.
Q. And construction man?
A. Yes sir.
Q. How long have you been in that business?
A. Since 1881.
Q. Have you ever constructed any bridges of the character of this one over here?
A. Yes sir.
Q. How many?
A. It would be pretty hard to tell; a good many; I have built a good many of them this summer.
222 Q. What do you mean by "a good many?"
A. Oh, probably 50 or 100.
Q. Are you acquainted with the character of bridges constructed by other contractors on other railroads?
A. Yes sir.
Q. You may state Mr. Steen whether the structure that was erected over the Canadian River that has been testified about, is usual or unusual in its character and construction?
A. It is of a character that has usually been followed where they expect to operate trains over the bridge before the iron work has arrived.
Q. Well, where they expect to operate trains over the bridge and also expect to use it for iron work, is it made weaker or stronger?
A. Stronger.
Q. Did it, in fact, belong to the stronger class?
A. Yes sir.

Mr. KEATON: Objected to.
Overruled.

Q. State whether or not it is the custom that plans shall be furnished by the railroad company in having the work done?
A. It is.
Q. Did you ever know of a case where they were not furnished?
A. Not in my experience, no sir.
Q. Is it usual or not that those plans shall be carried out under the eye of an engineer of the railroad company?
A. It is.
Q. What liberty has the contractor with reference to the character of the construction that he puts up under a contract with the railroad company?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

A. None whatever, outside of the plans and specifications.
Q. Do you mean that he cannot depart from the plans and specifications, is that your idea?
A. They would not allow him to do anything at all that might weaken the structure; they might allow him to use his judgment with reference to strengthening it.
223 Q. They furnish him with the plans and specifications and furnish him with an engineer?
A. Yes sir.
Q. And he has to follow those two?
A. Yes sir.
Q. Has McCabe & Steen ever put up a bridge across the Canadian River?
A. Yes sir.
Q. Prior to this one?
A. Yes sir.
Q. Where?
A. Eighteen miles southwest of Holdenville on the Sapulpa extension.
Q. When was that put up?
A. Three years ago about now, I think.
Q. What kind of a structure was that?
A. Very similar to this one.
Q. Built for the two purposes of carrying trains and for carrying the false work?
A. Yes sir.
Q. What penetration did you have there, do you know?
A. I could not tell you now; it has been so long ago I have forgotten.
Q. You say it was very similar to this one?
Q. Very similar, yes sir.
Q. What kind of trouble did you have with this one?

Mr KEATON: Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

A. We didn't have any trouble with it at all.

Q. Did you know Mr. Steen at the time of the construction of this bridge of any special difficulty in bridging the North Canadian?

Same objection. Overruled. Exception.

Q. —for a bridge of this character?

A. No, I cannot say that I did; we always hear of washouts at different places; I have heard of them on the Canadian, but we never had any——

224 Q. Is it not a fact that washouts occur on many rivers?

A. Yes sir, they do.

Q. And there is nothing that made the Canadian, in your judgment, different from the balance?

A. Not from the balance of that class of streams.

Q. What other streams in this country are of a similar class?

A. The Cimarron, Red River, Salt Fork, the North Canadian, all are very similar to that.

Q. Are there a number of rivers of similar character?

A. Yes sir.

Q. Are structures of this character used in crossing those streams?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff excepts.

A. They are.

Q. Do you call to mind Mr. Steen, the use of any different kind of a structure, prior to the happening of this event, in the crossing of any of these streams?

A. I have seen nothing as heavy as the plans we used; I have seen none as good as those plans; they are the best plans I ever saw.

Q. The only difference then is in favor of the structure that you put up out here?

A. Yes sir.

Mr. MOSELEY: Well, I believe that is all.

Cross-examination.

By Mr. KEATON:

Q. Do you know how much penetration the plans and specifications for this South Canadian River bridge called for?

A. Well, according to the plans they were to be about 18 feet, but as a rule wherever solid rock can be obtained at reasonable depth, they always go to it if possible.

225 Q. Well, you don't mean to say that they went down to solid rock out there all the way across?

A. No, not all the way across.

Q. You went out there——

A. I never seen the bridge in my life before or since it was finished.

Q. Before or since?

A. No sir, I rode over it on the train in the night.

Q. Now you say that Mr. Pratt had charge of the train crews?
A. Yes sir.
Q. Delivering material wherever it was needed?
A. Yes sir.
Q. And everything like that?
A. Yes.
Q. He had some connection with the building of bridges; his trains or the crews under him would furnish the material?
A. They would haul the material out always; all the bridge material hauled out on these trains was under his control.
Q. Was he called your superintendent of construction?
A. I don't know what the men called him; we did not consider him such.
Q. What did you call him?
A. Train master, foreman of trains.
Q. That is, he had authority to direct the movements and conduct of the trains and train men?
A. Yes sir.
Q. Now, Mr. Fallehey was your bridge foreman?
A. He was extra foreman; we used him as a bridge foreman, and for putting up water tanks, and such things as that.
Q. Well, at the time he was working out there building this South Canadian bridge he was your foreman?
A. Yes sir.
Q. Did you have more than one bridge foreman at that time?
A. I don't think we did on our work.
Q. He had authority to employ and discharge the men in his department, did he?
A. Yes sir.
226 Q. When you and Mr. McCabe were not present?
A. Yes sir.
Q. And you were present very little of the time?
A. I was here but very little.
Q. And how about Mr. McCabe?
A. He was here practically all the time.
Q. He was here more than you?
A. Yes sir.
Q. And even if you were here, he had authority to employ and discharge men, didn't he?
A. Oh, if he discharged a man we would not object to it.
Q. Or if he employed one?
A. Yes sir.

F. W. M'CABE was the next witness called to the stand by the defense, and gave the following testimony under oath, to wit:

By Mr. MOSELEY:

Q. Are you a member of the firm of McCabe & Steen?
A. Yes sir.
Q. Mr. McCabe, where did you reside during the construction of the Oklahoma & Southwestern Railroad?

A. In Oklahoma City.
Q. Oklahoma City & Western,—where——
A. In Oklahoma City and on the line of the railroad.
Q. What did you have to do with the construction of the road,—I mean personally?
A. Well, I had charge of it; I was superintending the work.
Q. What did you actually do?
A. Well, I hired all the foremen, and looked after the work.
Q. What part of it?
A. Practically all of it; instructed them where to work and what I wanted them to do, and looked after the work in general.
Q. Did you have any general employé or officer under you, who had charge of all the work?

Objected to as incompetent, irrelevant and immaterial.

227 A. No sir, I did not.
Q. Who was your foreman of bridge building?
A. Mike Fallehey.
Q. Did you have any other employé who had charge of your bridge building?
A. No sir.
Q. Did Mr. Pratt have any charge of it?
A. Mr. Pratt had no charge of it whatever.
Q. Did Mr. Pratt have charge of your depot?
A. No sir.
Q. Did you have a man who had charge of your depot?
A. Yes sir.
Q. Charge of the force that built the depot?
A. Yes.
Q. And a man that had charge of your water tanks?
A. Yes sir.
Q. Did Mr. Pratt have any charge of that part of the work?
A. No sir.
Q. Did he have any charge of the painting?
A. No sir.
Q. What were Mr. Pratt's duties?
A. Mr. Pratt had charge of the train service, hired the train men, and directed the trains and hauled the materials to the front,—kept the front supplied with material.
Q. Did he have to haul material to anybody else except to the front as you call it?
A. Yes, he hauled material to the bridges depots, water tanks, cattle guards, stock pens, and in fact everything——
Q. Where was the material kept?
A. Kept at Oklahoma City.
Q. What material was kept at Oklahoma City?
A. We kept the ties, steel rails, the lumber for the depots; in fact all of the materials came from Oklahoma City to build the line with.
Q. You had a depot here that you kept all the material in?
A. Yes, what we call a material yard.

228 Q. And as you went ahead with the work you had to distribute that?

A. Yes.

Q. Some of the material went to the depot builders, some to the painters, some to the track layers, some to the tank builders and some to the bridge men?

A. Yes sir.

Q. And Mr. Pratt had in charge the hauling and distribution of that material?

A. Yes.

Q. And had under his control the men that operated these trains?

A. Yes sir.

Q. Did he have under his control the men that worked in the yards at Oklahoma City?

A. No sir, we had a separate foreman for that.

Q. Who was that?

A. We had a man named Maning; he was loading out the steel rails, and a man named Wet that was loading out the building material.

Q. Well, Mr. McCabe, you heard some testimony about a bulletin which had been issued to the train men, with reference to running trains over the Canadian River Bridge,—who issued that bulletin?

A. I did.

Q. Do you know when you issued it?

A. No, I don't remember when I issued it; I issued it right after the Canadian River Bridge was built the first time; I don't know just how soon afterwards.

Q. Was it issued prior to the happening of this accident?

A. Yes sir.

Q. What did that bulletin contain?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, the bulletin itself being the best evidence.

Sustained.

Q. Have you got that bulletin?

A. Why no, we may have it in the office at Tulsa, but not with us.

Q. Where is Tulsa?

A. Tulsa, I. T.

Q. Is Tulsa outside the limits of Oklahoma?

229 A. Yes sir.

Q. Is there a copy of that bulletin in the limits of Oklahoma Territory that you know anything about?

A. No sir; not that I know anything about.

Mr. MOSELEY: Now we seek to prove the contents of it because it is outside the limits of the court.

(Discussion.)

The COURT: Take up another branch, gentlemen, and I will have it looked up. Gentlemen, I have had the clerk look up the costs in this case, and I am going to make an order——

Mr. MOSELEY: —I don't understand the court)——

The COURT: —The defendant will be permitted to amend the gen-

eral denial by striking out those words (the words heretofore referred to) by the payment of half of the costs of court to this date except the witnesses of the plaintiff—the fees; that is, provided, however, that if a continuance by reason of this amendment is taken by the plaintiff, the defendant shall be taxed with all the costs, unless the court should continue it on account of some showing made by the plaintiff, then of course the costs occasioned by the amendment would follow.

Mr. KEATON: Counsel for plaintiff here states that if it is permitted to show by testimony that the McCabe & Steen Construction Company were not building this road and not building the bridge, then the plaintiff will have to make a showing and ask for a continuance of the case in order to reform the pleadings.

Mr. MOSELEY: Well, we have not offered that testimony yet.

The COURT: You gentlemen have heard my statement that if a continuance should be made necessary then all the costs will follow.

Whereupon the defendant amends its answer by striking out certain words, the same being "—in manner and form as therein set forth," which appeared between the word "petition" and the word "and" in the third line of first paragraph of said answer (see page 9)

230 Mr. McCabe, how long have you been in the construction business?

A. Since 1881.

Q. Do you know the bridge built out here on the Canadian River?

A. Yes, sir.

Q. Did you see it while it was being constructed?

A. Yes, sir.

Q. I mean after the first high water there, while it was being repaired, reconstructed.

A. Yes.

Q. How often were you there?

A. I think I was there every day.

Q. Please state to the jury whether or not that bridge was substantially and properly built or not?

Mr. KEATON: Objected to as incompetent, leading and suggestive.

Objection sustained.

A. —I certainly think——

The COURT: Wait, the objection is sustained.

Q. Will you tell the jury whether or not the construction of that bridge differed from the—(I don't want to ask that question either)—I would like for you to tell the jury how that bridge was constructed?

A. Well, it was driven with 5 piles to the bent, with a 12 by 12 cap on top of the piles.

Q. Well, what was the distance between the piles?

A. Why one pile was driven right in the center of the bridge and two went on each side of them, about, to the best of my recollection, two feet apart, from center to center, and another pile on the outside.

Q. How far were the bents apart?
A. They were 16 feet from center to center.
Q. How were those bents braced, longitudinally—the pile bents, that is?
A. Longitudinally?
Q. Yes.
A. Well, they had two stringers in the center drifted to the caps.
231 Q. How far did they extend?
A. From one cap to the other clear through the bridge.
Q. Did you see those piles driven?
A. Yes, the biggest part of them.
Q. State how far they were driven and what they reached, if anything—I am speaking of the renewal now?
A. All the piling that I saw driven in the renewal was driven to solid rock without any doubt.
Q. Can you tell by looking at the pile driver and seeing the operation of it, whether or not the pile is driven to solid rock?
A. Yes, I can tell when the hammer hits the pile and it shows no resistance; you can tell it is on solid rock.
Q. You mean when there is no penetration, don't you?
A. Yes, sir, you can tell from the way it hits the piling when it is on solid rock, and then you take the jet and use that and when you hit the rock you can feel it that way, you know, and you can hear it ring on the solid rock.
Q. What was the penetration through the dirt before the rock was reached?
A. Well, it varied; the first bent east,—I call this side east—the first bent east had about ten feet of penetration before it struck the rock; the next bent about two feet more, and so on out on the bridge; it varied.
Q. Is a structure upon that kind of a foundation, of the material that you have described, and with the longitudinal bracing that you have described, a safe or unsafe structure for a bridge?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, and to the competency of the witness.
Overruled.
Exception.

A. I considered the bridge perfectly safe.
232 Q. Do you know what was the cause of the trouble with the bridge in the first place?
A. Yes, sir.
Q. What?
A. The drift got against the bridge and shoved it down the stream; it weighed against the bridge so hard that it shoved it down the stream two or three feet.
Q. Now in the reconstruction, had any provision been made against that?
A. Yes, sir; we put,—in the first place, when the drift came again the bridge and shoved it down, the drift bolts, that were drifted from

the cap into the piling bent; it was not sufficient to hold it, though we took sway braces, two sway braces and put one on each side of the pile bent, half way across it and bolted it to every pile and then put our cap on the top of them and bolted it, and then put our sway braces on; in addition to that we put four braces on to each bent instead of two, and we thought we had it secure then.

Q. Now you say that, at the time of the first flood, the drift broke the pile——

A. No, sir, it didn't break the pile; it shoved them over.

Q. It broke loose the pile fastened then on the top, is that your idea, where the pile was fastened to the cap?

A. No, it shoved against it so hard that it shoved the piling down stream, and they all leaned down stream.

A. Oh, I see. In other words, the foundation, that is the points of the piling in the ground, were not moved very much or so much as the top of the piling?

A. No, sir, the top of the piling leaned down stream, and the bottoms may have moved, but they didn't look to me like they had moved.

Q. The drift then, in that first case, came against the sides of the bents,—I suppose the jury understand by now what the bents are—these piles, the evidence shows that they set up stream——

233 A. Yes, sir, across the stream.

Q. The edge then of the pile bent was presented to the flow of water, was it?

A. Yes, sir.

Q. And the next one came like this (ills.)?

A. Yes.

Q. And they were along across the stream?

A. Yes.

Q. Now you say that the flood of drift was so strong that when it struck the pile bent it pushed it over that way?

A. Yes, sir.

Q. So that the piling leaned down the stream?

A. That is it exactly.

Q. And the pile bents went sideways out of plumb?

A. Yes, sir.

Q. Is that the idea?

A. That's the idea, yes, sir.

Q. Now then, in order to strengthen that weakness, you had what put on?

A. We put on additional braces, two additional braces, and bolted them right under the cap, to every pile.

A. I thought that would fasten them, and if the drift got against it, it would not shove them over from the top.

Q. Now did the first bridge sink in any way?

A. I don't think it did.

Q. There was nothing then in the happening of the first accident that led you to believe that the bridge would sink?

Mr. KEATON: We object to that as leading and suggestive and incompetent.

Sustained.

Q. Did you taken any steps with reference—at the construction of the second bridge—with reference to protecting it from drift?

A. Yes, sir.

Q. What did you do?

A. We kept men there to keep the drift out of the way; when drift would strike the bridge, why they would be there with poles and axes.

234 Q. Was that by your order?

A. Yes, sir.

Q. When was the last time that you were out there at the bridge?

A. Either Friday or Saturday before the accident; I think it was Saturday morning when I left the bridge.

Q. What was the condition of the water at that time?

A. The water at the time I left was falling.

Q. Where were you on Monday?

A. On Monday I was in Kansas City.

Q. When did you leave here for Kansas City?

A. I left here Saturday night.

Q. Had there been any rise of water that you knew of at the time you left?

A. No, sir.

Q. When did you return?

A. I got a telegram on Monday morning about the bridge washing out and I left Monday night — Kansas City to come back here, and I think I got here Tuesday morning.

Q. Where did Mr. Steen stay?

A. Mr. Steen was on another job.

Q. Where?

A. We were doing other work; he was looking after a job we had at Cape Girardeau, Missouri, and also some work that we were doing in the Indian Territory.

Mr. MOSELEY: I think we are through.

Cross-examination by Mr. KEATON:

Q. Mr. McCabe, you say that you did not see all of the piles put in at the time this bridge was washed out?

A. I don't think I saw every one of them; I came in town over nights.

Q. I beg pardon, if your Honor pleases; I want to introduce that testimony about the bulletin, as soon as the court is ready to pass upon it.

WITNESS: I came in town every night and went out again the next morning.

Q. Let's see; there were about twelve bents washed out at that time, altogether, were there?

A. Yes, sir, there were either 11 or 12 bents washed out.

235 Q. They were about 16 feet apart were they, from center to center?

A. Yes sir.

Q. You put them back 16 feet apart?

A. Yes.

Q. You put them back according to the same plans and specifications that you put them in originally, except that you put these extra braces in?

A. Yes sir, that is all we did in addition to that.

Q. Well, now, when did you expect to turn this bridge over Mr. McCabe?

A. Just as soon as they erected;—as soon as they got through with the erection of the bridge there, why they were to put their iron bridge up and take down this false work.

Q. Take the piles out?

A. Take the piles out and the false work; in fact take all the timber out and leave a clear channel.

Q. You expected to keep men there whenever there was a freshet to keep the drift from tearing the bridge down again?

A. Yes, whenever we heard there was a freshet, we would——

Q. Now you say that Mr. Pratt did not have any control at all or any authority over the bridge gang?

A. None at all, no sir; Mr. Pratt knew nothing at all about the bridge work.

Q. Well, never mind. He had control of the train service?

A. Yes sir.

Q. Employed men there and discharged them?

A. Yes sir.

Q. And directed the trains?

A. Yes sir.

Q. And directed the employés in that service?

A. Yes sir.

Q. He had authority to do that?

A. Yes sir.

Q. Now Mr. McCabe, if this piling were driven down to bed rock or if the piling in any particular bent on the bridge,—you say there were five of them,—were driven down to bed-rock, and an
236 engine came upon that bent, could that piling sink down perpendicularly four inches?

A. If it was on bed-rock?

Q. Yes.

A. Oh, it could; it could slip down——

The COURT: Just a moment, Judge. (To a juror:) Mr. Miller, a man wants to speak to you.

(Whereupon said juror leaves the box and returns.)

Q. Go ahead, answer the question.

A. Why, it could slip down on the rock.

Q. Well, if it was already down to rock, how could it sink perpendicularly?

A. I mean, sloping rock; it would slip down and lower the bridge.

Q. You mean that it could slide out to one side?

A. Yes sir.

Q. The bottom could slide?

A. Yes, one way or the other.

Q. Then it would not be perpendicular, would it?

A. Well, of course, if it would slip down very much, it would not.

Q. Well, unless the rock was very steep and it sloped enough to lower the top four inches, it would have to slope very considerably at the bottom, would it not?

A. Yes, unless the rock was very steep, but this piling may have been on a raised boulder and maybe the boulder worked out from under this piling.

Q. Well, would there probably be a boulder work out from each of those five bents?

A. Don't look like,—altho such things could happen.

Mr. KEATON: Yes, that is all.

Redirect by DEFENDANT:

Mr. MOSELEY: Now, you may state the contents of that bulletin.

237 Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

Objection overruled.

A. To the best of my recollection it read: All trains passing over the Canadian River would stop and see that everything was safe before crossing. That is the best of my recollection of the way it read.

Mr. MOSELEY: Was anything said about signalling?

A. Not a word about signalling, I don't think.

Mr. MOSELEY: Did you keep anybody there to signal at night?

A. The iron bridge men had a watchman there and we had nobody.

Mr. MOSELEY: McCabe & Steen had nobody there?

A. No sir.

By Mr. KEATON:

Q. Now did you expect those engineers coming along there, and especially at night, to get out and see whether the bridge was safe before crossing it?

A. If there was a rise in the river we certainly did.

Q. —expected them to determine——

A. —expected them to look out and see that it was all right, if there was a rise in the river.

Q. Do you suppose that any engineer that you had on your line could have determined that?

A. If there was a strong current in the river they didn't ought to cross it because they all knew that it was a treacherous stream.

Q. It was not a bridge then that it was safe to cross when there was a swift current in the river, in your judgment?

A. Well, if there was drift up against it, they ought not——

Q. —Well, you didn't mention drift, you said if there was a strong current and a rise. You have just said Mr. McCabe that if they came there and the river was up and a swift current in

238 it, it would be their duty to examine it and not cross it; then you would not have considered that the bridge would have been safe for them to cross in that condition?

A. Well, if there was a drift piled up against it and a swift current——

Q. Well, suppose they looked and didn't see any drift and the river was up, then what?

A. Most anybody could tell whether there was drift on it.

Q. Well, suppose there was no drift and the river was up?

A. It looks like it ought to be safe.

Q. Then you did expect them to cross it?

A. Well, they were to use their own judgment,—if they thought it was safe to cross it——

Q. Oh, well, you didn't tell them anything about that in the bulletin?

A. No sir.

Q. Well, suppose the foreman of the bridge gang and the gang were there at work, and Mr. Pratt, the superintendent,—the road master that handled the train men, would you expect the engineer and fireman to determine then whether they ought to cross the bridge?

A. No.

Mr. KEATON: That's all.

Whereupon Defendant rests.

Plaintiff rests.

And, there being no more evidence offered, case closes.

239 TERRITORY OF OKLAHOMA,
County of Oklahoma, ss:

I, Frank W. Inglis, official stenographer of the District Court sitting within and for the County of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all of the evidence of witnesses, objections of counsel, rulings of court and exceptions to such rulings taken by me in shorthand on the trial of the above entitled cause at Oklahoma City, said County, before Hon. B. F. Burwell, Judge, during the September 1903, term of said court.

FRANK W. INGLIS,
Off. Sten.

Filed November 5, 1904.

BENJ. F. HEGLER, *Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

Filed Oct. 30, 1903 —
B.D. Shear, Clerk,
Ex. A,

M. St. Abel v. Steam Con. Co. v. Wilson } No. 155. p. 240 a

8198

3548

Ex. B.

Filed Oct. 30, 1903-
B. D. Shear, Clerk.

McCabe v. Texas Con. Co. v. Wilson, } p. 240 ½

240 The exhibits A & B on this page were introduced in evidence upon the trial, as noted at page 19 of this case made.

"EXHIBIT A."

Photograph.

(Here follows photograph marked page 240*a*.)

"EXHIBIT B."

Photograph.

(Here follows photograph marked page 240*b*.)

241 This "Exhibit C" was filed by the defendant at the close of the testimony offered by the plaintiff at the time, and as noted at page 66 of this case made.

"EXHIBIT C."

In District Court Oklahoma Co., O. T., Sept. Term, 1903.

No. 3548.

WILLIAM N. WILSON
vs.
McCABE & STEEN CONSTRUCTION CO., a Corporation.

Comes now the defendant by its attorneys at the close of the testimony offered by the plaintiff upon the trial of this cause & before any testimony has been offered by defendant and demurs to the testimony offered by the plaintiff and says that the same is not sufficient in law to entitle the plaintiff to the relief he seeks or to any judgment whatever in this cause & of this it prays judgment etc.

SNYDER & CLARK,
MOSELEY & EPPSTEIN,
Att'ys for Def't.

Endorsed: #3548—Wm. N. Wilson *vs.* McCabe & Steen Construction Co., a corporation, Defendants—Demurrer to plaintiffs evidence—Filed Oct. 30, 1903. B. D. Shear, Clerk—Snyder & Clark, Moseley & Eppstein, Att'ys for def't.

242 This "Exhibit D" was filed by the defendant during the trial of the cause, and with the consent of the court at the time, and as noted in this case made at page 162 hereof.

"EXHIBIT D."

In District Court, Oklahoma Co., O. T.

No. 3548.

WILLIAM WILSON
vs.
McCABE & STEEN CONSTRUCTION CO.

Comes now the defendant after announcement of ready for trial and after the plaintiff has closed the introduction of his evidence in the cause but before the defendant has closed the introduction of evidence in its behalf & moves the court to grant it leave to amend its answer filed in said cause for the reasons that appear in the record

of evidence introduced in this cause & set forth in the affidavit attached & made a part of this motion.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

TERRITORY OF OKLAHOMA, *County of Oklahoma:*

Before me the undersigned authority on this day personally came A. G. Moseley who having been by me first duly sworn deposes and says:

1st. That he is a member of the firm of Moseley & Eppstein, att'ys at law, that said firm & the firm of Snyder & Clark are the attorneys for defendant in cause No. 3548 styled William Wilson *vs.* McCabe & Steen Construction Co., a corporation, pending in
243 the district court of Oklahoma County, O. T.; that affiant has had charge of the preparation of said cause for trial and prepared & caused to be filed the answer filed in said cause on Dec. 1st, 1902.

2nd. That at the time said answer was prepared & filed affiant did not know and affiant is informed & believes the fact to be that no other attorney in this cause knew that the defendant was not in fact the employer of the plaintiff at the time alleged in the petition; that affiant first became aware of & was first informed of such fact on 7th day of October, 1903; that after obtaining such information, affiant believed that the evidence could be introduced under the pleading filed in said cause & so advised the defendant; that it was never the intention of affiant or of the defendant to waive such defence; that affiant & the defendant are surprised at the ruling of the Court refusing to admit the evidence offered on said issue & now ask the court in good faith to permit the defendant to amend said answer so that said defence can be admitted under the ruling of the court.

A. G. MOSELEY.

Subscribed and sworn to before me this 29th day of Oct., 1903.

B. D. SHEAR, *Clerk,*
[SEAL.] By WILL H. CLARK, *Deputy.*

Endorsed: #3548—William Wilson *vs.* McCabe & Steen Construction Co.—Motion for leave to amend pleading—Filed in District Court, Oklahoma County, O. T., Oct. 29, 1903—B. D. Shear, Clerk, By Will H. Clark, Deputy.

244 This "Exhibit E" is a copy of the instrument offered in evidence by the defendant as shown on page 161 of this case made, and rejected by the court and again offered in evidence by the defendant and admitted by the court as shown at page 163 of this case made.

"EXHIBIT E."

Copy.

For value received, we hereby assign, transfer and set over unto the McCabe & Steen Construction Company, the within contract, together with any and all rights therein existing in our favor, subject to all the conditions and provisions contained in said contract. And the said McCabe & Steen Construction Company is hereby expressly authorized to collect and receive any and all sums of money due or to become due us under said contract.

St. Louis, Mo., July 23, 1902.

FRANK W. McCABE.
VERNON E. STEEN.

The undersigned, McCabe & Steen Construction Company, does hereby accept the above assignment of the within contract and does hereby covenant and agree to fully comply with all the covenants on the part of the said McCabe & Steen contained in said contract.

St. Louis, Mo., July 23, 1902.

McCABE & STEEN CONSTRUCTION CO.,
[SEAL.] By FRANK W. McCABE, *President*.

Attest:
JOHN L. POSEY, *Secretary*.

245 We the undersigned, for value received, do hereby consent to the above assignment of the within contract by McCabe & Steen to the McCabe & Steen Construction Company.

St. Louis, Mo., July 23, 1902.

JOHNSON BROTHERS.

At the conclusion of the offer of evidence by the parties, plaintiff and defendant, as stated on page 180 of this case made, the defendant submitted to the Court certain written special instructions to the jury, which had been prepared by its counsel, and which were numbered by them consecutively from 1 to 15, and requested the court to give to the jury special instruction No. 1 and if refused that he give special instruction No. 2, and if refused that the other special charges, numbered from 3 to 15 inclusive, be severally given in the order in which they are numbered. Said special instructions are set out on pages 188 to 197 of this case made and are as follows.

246 WILLIAM WILSON
vs.
McCABE & STEEN CONSTRUCTION CO.

Comes now the defendant & requests the court to give the following special charge No. 1 and that if refused that special charge No. 2 be given & if refused that the other special charges here requested be given in the order in which they are numbered.

No. 1. Gentlemen of the jury, you are instructed in this case, to bring in a verdict in facor of the defendant.

Refused.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Atty's for Def't.

247 WILLIAM WILSON
vs.
McCABE & STEEN CONSTRUCTION CO.

Defendant requests following instruction No. 2 to be given to the jury:

Gentlemen of the jury, The undisputed evidence shows that after plaintiff arrived at the bridge he saw that the water was high and he also saw a bent in the bridge sink which he assisted in repairing. That just before the engine and train were started on to the bridge the engineer Waters told plaintiff that he could get off of the engine and get on the caboose when it pulled up and thereby escape risk. That plaintiff had time & opportunity for choice. It does not appear that taking advantage of the offer would have prejudiced plaintiff in any way. That plaintiff did not avail himself of the offer, which would have saved him from harm, but stayed in the engine & was injured. This will prevent plaintiff from recovering and you will so find for it does not matter whether plaintiff was influenced to remain on the engine, when a safer place was offered to him either by the tests of the bridge which he had witnesses or by the assurances of Pratt & Fallahey reported to him by Waters that the bridge was safe for in the former instance he will be held to have assumed the risk and in the latter instance his conduct would be attributable to the act of fellow servants and in neither case would the master be liable.

Respt.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

248 3. You are instructed that if the defendant, in repairing this bridge, performed the work in the usual and customary manner in which work of this character, under similar circumstances is constructed, and used that degree of care in the erection and construction of such structure that a person of ordinary prudence engaged in such work would have used under like circumstances, then the defendant would be guilty of no negligence in the construction and repair of such bridge. And in such case you will find for defendant. Unless you further find that after a portion of the bridge was taken out and such repairs made the defendant in the light of all of the facts within its knowledge ought to have known that at the time of the alleged injury the bridge was unsafe or was in possession of such knowledge, facts and circumstances as would have caused an ordinarily prudent person engaged in such business to investi-

gate and if investigation has been made it would have led to a knowledge that the bridge was unsafe.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

249 4. The jury are instructed that if they believe from the evidence that plans were furnished by the Ry. Co. for the construction & repair of the bridge & that the same was constructed & repaired in accordance with such plans under the direction of a competent engineer furnished by the railway Company and was in such completed state when plaintiffs crossed it in the engine and that the falling of the bridge was occasioned by high water that rose the night before the accident & that defendant had no knowledge or notice of the existence of such danger you will find for defendant.

Requested & submitted.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

5. The jury is instructed that negligence is never presumed but must be proven. That in order for plaintiff to recover you must find the defendant guilty of some act of negligence complained of in plaintiff's petition. That the fact, standing alone of the sinking or falling of the bridge will not of itself be sufficient to justify you in finding the defendant guilty of negligence. (1)

Requested & submitted.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

250 6. Gentlemen of the jury, you are instructed that the fact and the bridge in this case, went down and that the accident complained of by plaintiff occurred, is not of itself evidence of any negligence on the part of the defendant, and that the burden of proof remains upon plaintiff to establish by a preponderance of testimony by which is meant, the greater weight of credible testimony, that the defendant was guilty of the negligence charged in said petition. The burden is on the plaintiff to show the particular act or acts of negligence on the part of defendant that proximately caused the injury complained of. So even if you should believe that defendants may have been guilty of some act of negligence yet, if you believe that the act of any other person intervened between the such act of defendant & plaintiff's accident and that the act of such other person was the immediate & proximate cause of plaintiff's injuries you will find for defendant. In this connection you are charged that the conversations & statements alleged to have been had at the bridge between Fallahey & Pratt & the train men can not be imputed to defendant.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

251 7. Gentlemen of the jury, you are instructed that even if you believe from the evidence that defendant was guilty of negligence toward this plaintiff, in any of the matters submitted to you in the charge of the Court, and that such negligence contributed to the injuries in question in this suit, still if you further find from the evidence that the plaintiff, in remaining in his cab and going upon the bridge under the circumstances of this case, did not exercise that degree of care that an ordinarily prudent person would have exercised under similar circumstances, in that event, plaintiff cannot recover in this suit, and in this connection you are further charged that if the engineer in charge of the engine on which plaintiff attempted to cross said bridge, suggested to plaintiff another and safer plan for plaintiff to adopt in crossing said bridge and gave plaintiff the option of leaving the cab and catching the end of the train; and if the jury further believe that the adoption by this plaintiff of this plan would have prevented the accident which occurred to plaintiff in this case; and that the plan suggested by the engineer would have been adopted by an ordinarily prudent person under the circumstances and if the jury further believe from the evidence that the plaintiff, after receiving such option to alight from said cab and wait until the engine had passed over said bridge in safety before attempting to go over, elected to remain on said cab and cross said bridge in the manner in which he did; and if the jury further believe that in so doing, the plaintiff did not act as a reasonably prudent person would have done under similar circumstances, then you are instructed that the plaintiff cannot recover in this case.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'y for Def't.

252 8. You are instructed that an employee is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially result from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them. Therefore, if you believe from the evidence that the danger to plaintiff from crossing this bridge was so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them, then and in that event he cannot recover.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'y for Def't.

No. 9. Gentlemen of the jury, you are instructed that plaintiff in entering into a contract of employment as fireman upon construction work, impliedly contracted that he was familiar with the duties of such position and understood the ordinary dangers thereof. Therefore, you are charged that if you believe from the evidence

that accidents such as occurred to plaintiff are such as ordinarily are likely to occur in work of this character, then you are charged that plaintiff cannot recover in this case.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'y for Def't.

253 No. 10. Gentlemen of the jury, you are instructed that if the injury complained of by the plaintiff was the proximate result of the negligence or want of proper care of any other employee of the defendant, who was engaged in the same general employment and was working to the same general end that plaintiff was, that such other employee would, under the law, be a fellow servant of the said plaintiff and he could not recover for injuries sustained by reason of the negligence or want of care of said fellow servant, and in this connection, you are charged that Pratt and Fallehey under the evidence in this case were both fellow servants of the said plaintiff and that they were both engaged with him in the common purpose of constructing the railroad which they were engaged in building, and if plaintiff's injuries were due to the negligence or want of proper care on the part of either Pratt or Fallahay, or both of them, then and in that event, plaintiff cannot recover.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

254 No. 11. Gentlemen of the jury, you are instructed that construction companies are not required to use extraordinary tests for the purpose of discovering defects that threaten the safety and security of bridges which they are constructing, which are not practicable and customary, but that they fulfill their duty, if they adopt such tests for this purpose as are ordinarily used by reasonably prudent construction companies, under like circumstances, engaged in work of like character; and in this connection, you are charged that if the defendant adopted such tests for the purpose of discovering whether or not this bridge was safe, that an ordinarily prudent construction company, under similar circumstances would have adopted for the same purpose, and if such tests would have satisfied any reasonably prudent construction company that the same was safe for the purpose for which they expected to use it, then you will find for the defendant, but on the other hand the mere fact that the bridge may have stood the test usually adopted this would not excuse the defendant if they were at the time in possession of facts and circumstances which would cause an ordinarily prudent person familiar with such work to have a well grounded apprehension of danger and such as would cause such an one to investigate and that an investigation would have discovered the defects and avoided the injury.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Att'ys for Def't.

255 No. 12. The jury are instructed that if they believe from the evidence that the bridge was safe & secure on Sunday & that the falling in was occasioned by high water that rose Sunday night & that the defendant had no notice or knowledge of the rise in the river you will find for defendant, and in this connection you are instructed that notice to Fallahay or Pratt would not constitute notice to the defendant.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK, *Att'ys.*

No. 13. The jury is instructed that if they believe that the bracing and supports of the bridge were reasonably sufficient and were placed in the usual and customary manner and that the falling of the bridge was caused by washing away of the dirt between or around the supports and that such fact could not have been discovered by the defendant by the exercise of ordinary care then you will find for the defendant but it is for you to say under all of the evidence as to what was the cause of the bridge falling and as to whether the same could have been averted by the exercise of ordinary care on the part of the defendant.

Submitted & requested.

MOSELEY & EPPSTEIN.
SNYDER & CLARK.

256 No. 14. The jury are instructed that the uncontradicted evidence having shown that the defendant Company did not originally build & did not make the repairs upon the bridge in question you can not hold it responsible for any faults in construction. Therefore if you believe from the evidence that the proximate cause of plaintiff's injury was faulty construction of the bridge you will find for defendant.

Submitted & requested.

MOSELEY & EPPSTEIN,
SNYDER & CLARK.
Att'ys for Def't.

15. If you believe from the evidence that defendant had issued an order to the trainmen to stop at the bridge and see that everything was safe before crossing and if you further believe that said bridge was constructed in a reasonably safe manner and with reasonably safe materials and that the proximate cause of the bridge giving way was the effect of high water which had risen the night before the accident and was still up at the time plaintiff arrived at the bridge, and if you further believe that plaintiff relied upon the report of the engineer Waters and Fallahay and Pratt as to the condition of the bridge, and that defendant was not present and did not advise plaintiff to cross the bridge, you are charged that plaintiff will be held at law to have assumed the risk of crossing the bridge & can not recover for injury sustained thereby.

Submitted & requested. MOSELEY & EPPSTEIN.
SNYDER & CLARK.

Endorsed: # 3548—Wilson *vs.* McCabe & Steen—Instructions asked by deft.—Filed Oct. 30, 1903. B. D. Shear, Clerk.

257 Whereupon the court refused to give said instructions or any of them to the jury to which ruling and refusal of the Court, the defendant then and there duly excepted; and the court thereupon instructed the jury as follows:

TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

No. 3548.

WILLIAM N. WILSON
vs.
McCABE & STEEN CONSTRUCTION COMPANY, a Corporation.

Instructions to Jury.

Gentlemen of the Jury, the court instructs you as follows:

This is an action commenced by the plaintiff against the defendant to recover the sum of $20,000.00 as damages for personal injury as fully set out and charged in the petition. To this petition the defendant has filed an answer which is first a general denial and then alleges other affirmative matter. To this answer plaintiff files a general denial and the issue for you to determine from the evidence under the instructions of the court is as to whether the plaintiff is entitled to recover and if so in what sum. The burden is upon the plaintiff to establish his rights to recover by a preponderance of the evidence. By a preponderance of the evidence is meant that evidence which to the minds of the jurors is more convincing.

2. In this case you are instructed that it was the duty of the defendant to use all reasonable care and precaution to see that
258 the bridge where the injury occurred, if you find that the defendant was injured, was in a safe condition, but if you find that the bridge was constructed in a manner approved and considered sufficient by those skilled in bridge building and that the defendant used all reasonable precaution to prevent an accident and that the falling of the bridge could not reasonably have been anticipated when taking into consideration all of the facts within the defendant's knowledge, then and in that event the plaintiff cannot recover, but if taking all of the facts and circumstances as described by the evidence, into consideration the defendant could reasonably have anticipated that the bridge was unsafe, then and in that event it was the duty of the defendant to see to it that the bridge was put in a safe condition and what it was sufficiently strong to carry trains safely over same and if the defendant with such information and knowledge of the defective condition of the bridge or with

knowledge of such facts and circumstances as would cause persons acquainted with the nature and character of bridge structure similar to the one in question, to apprehend that it was unsafe and dangerous, without taking steps to ascertain as to whether it was safe or unsafe, caused the plaintiff to cross such bridge with his train and the bridge fell and by reason thereof the plaintiff was injured, then he is entitled to recover, unless you further find that he himself was guilty of contributory negligence.

3. When one accepts employment he assumes all of the ordinary risks incident to such employment and while one engaged in running a work train or a train to carry supplies over a new line being built and on which is placed what is known as false or temporary bridges cannot in law demand that the employer build such
259 temporary bridges so that there cannot be a possibility of an accident, still where the employee is not engaged in the construction of such road or bridge but is engaged solely in working on such train as fireman, he has a legal right to rely upon the safety of the bridge and if he suffer injury by the bridge falling he may recover unless the employer used all reasonable precaution to make the bridge safe and had reasonable grounds to believe that it was safe at the time, or the employé was guilty of contributory negligence. In other words the employees accepted the employment with knowledge of the increased danger of running a train over false work or temporary bridges and he assumed all of the ordinary risks incident thereto; but if the danger was increased by the neglect of the defendant either to use proper care after it found that it was weak, or to put it in repair after such time or to ascertain the condition thereof or to take such due and proper precautionary measures as would be adopted by an ordinarily prudent person engaged in such work, to prevent accidents to employees, as the exigencies of the situation might require, he did not assume such additional risk unless you find that the plaintiff ought, under all of the circumstances, to have known that the bridge was dangerous; and in determining as to whether the plaintiff ought to have known that the bridge was dangerous you are instructed that the plaintiff was not chargeable with the technical knowledge of an expert in bridge building, but only with such knowledge as is possessed by one engaged in plaintiff's occupation at the time, taking into consideration the plaintiff's knowledge, experience and education. If the defects were such as the plaintiff, situated as he was ought to have known and that notwithstanding such fact he crossed the bridge, then he cannot recover, but if the defects in the bridge were
260 hidden and were such as would require one skilled in bridge work to discover and that the plaintiff did not in fact know that the bridge was unsafe, then the plaintiff was not chargeable with knowledge of such defect.

4. You are instructed that if the defendant, in repairing this bridge, performed the work in the usual and customary manner in which work of this character, under similar circumstances is constructed, and used that degree of care in the erection and construc-

tion of such structure that a person of ordinary prudence engaged in such work — have used under like circumstances, then the defendant would be guilty of no negligence in the construction and repair of such bridge, and in such case you will find for defendant, unless you further find that after a portion of the bridge was taken out and such repairs made the defendant, in the light of all of the facts within its knowledge, ought to have known that at the time of the alleged injury the bridge was unsafe, or was in possession of such knowledge, facts and circumstances as would have caused an ordinarily prudent person engaged in such business to investigate, and if investigation had been made it would have led to a knowledge that the bridge was unsafe.

To which defendant then and there in open court excepted.

5. The jury are instructed that if they believe from the evidence that plans were furnished by the Ry. Co. for the construction and repair of the bridge and that the same was constructed and repaired in accordance with such plans under the direction of a competent engineer furnished by the railway company and was in such completed state when plaintiff crossed it in the engine and that the falling of the bridge was occasioned by high water that arose
261 the night before the accident and that defendant had no knowledge or notice of the existence of such danger, you will find for defendant, unless you further find that after the erection of such bridge the defendant was in possession of facts which would arouse the suspicions of the defendant, and cause it to doubt the sufficiency of the bridge, in which event if thereafter it failed to investigate and repair the bridge and make it safe, if the defects could reasonably have been ascertained, then the defendant would be guilty of negligence.

6. Gentlemen of the jury you are instructed that even if you believe from the evidence that defendant was guilty of negligence toward this plaintiff in any of the matters submitted to you in the charge of the Court, and that such negligence contributed to the injuries in question in this suit; still, if you further find from the evidence that the plaintiff, in remaining in his cab and going upon the bridge under the circumstances of this case, did not exercise that degree of care that an ordinarily prudent person would have exercised under similar circumstances, in that event, plaintiff can not recover in this suit; and in this connection, you are further charged that if the engineer in charge of the engine on which plaintiff attempted to cross said bridge, suggested to plaintiff another and safer plan for plaintiff to adopt in crossing said bridge, and gave plaintiff the option of leaving the cab and catching the end of the train; and if the jury further believes that the adoption by this plaintiff of this plan would have prevented the accident which occurred to plaintiff in this case, and that the plan suggested by the engineer would have been adopted by an ordinarily prudent person under the
262 circumstances; and if the jury further believe from the evidence that the plaintiff, after receiving such option to alight from said cab and wait until the engine had passed over said bridge

in safety before attempting to go over, elected to remain on said cab and cross said bridge in the manner in which he did; and if the jury further believe that in so doing the plaintiff did not act as — reasonably prudent person would have done under similar circumstances, then you are instructed that the plaintiff cannot recover in this cause.

7. You are instructed that an employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially result from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them. Therefore, if you believe and find from the evidence that the danger to plaintiff from crossing this bridge was so obvious- threatening that a reasonably prudent man under similar circumstances would have avoided them, then and in that event he can not recover.

8. Gentlemen of the jury, you are also instructed that construction companies are not required to use extraordinary tests for the purpose of discovering defects — threaten the safety and security of bridges which they are constructing which are not practicable and customary, but that they fulfill their duty if they adopt such tests for his purpose as are ordinarily used by reasonably prudent construction companies, under like circumstances, engaged in work of like character; and in this connection, you are charged that if the defendant adopted such test for the purpose of discovering
263 whether or not this bridge was safe, that an ordinarily prudent construction company under similar circumstances would have adopted for the same purpose, and if such tests would have satisfied any reasonably prudent construction company that the same was safe for the purpose for which they expected to use it, then you will find for the defendant, but on the other hand the mere fact that the bridge may have stood the test usually adopted would not excuse the defendant if it was at the time in possession of other facts and circumstances which would cause an ordinarily prudent person familiar with such work, to have a well grounded apprehension of danger and such as would cause such an one to investigate and that an investigation would have discovered the defects and avoided the injury.

9. The jury are instructed that if they believe that the bracing and supports of the bridge were reasonably sufficient and were placed in the usual and customary manner and that the falling of the bridge was caused by washing away of the dirt between or around the supports, and that such fact would not have been discovered by the defendant by the exercise of ordinary care, then you find for the defendant; but it is for you to say under all the evidence as to what was the cause of the bridge falling and as to whether the same would have been averted by the exercise of ordinary care on the part of the defendant.

10. The jury are instructed that the uncontradicted evidence having shown that the defendant company did not originally build and did not make the repairs upon the bridge in question, you can not hold it responsible for any faults in construction. Therefore, if you

believe from the evidence that the proximate cause of plaintiff's injury was faulty construction of the bridge you will find for
264 defendant, unless you further find that defendant knew the construction of said bridge in which event it would be chargeable the same as though it had caused it to be built.

And in this connection you are further instructed that the defendant is estopped from claiming that it was not operating the train in question or that Fallahay or Pratt or plaintiff was not in its employ or that it was not in existence at the time of the alleged injury.

11. If you find that defendant had issued an order to all train men to stop at the bridge and see that everything was safe before crossing this order would not require each person on the train to get off of the train and make a personal inspection of the bridge. If the general superintendent of the defendant was present and advised the train crew that the bridge was safe and signaled the train men to cross over the order in question was sufficiently complied with.

12. The jury are not authorized in the absence of evidence to find that the defendant was guilty of contributory negligence; but negligence on the part of the plaintiff or defendant is a matter which must be established by evidence; in determining these issues, you may take into consideration all of the facts and circumstances appearing upon the trial.

13. The jury are instructed that negligence is never presumed but must be proven. That in order for plaintiff to recover you must find the defendant guilty of some act of negligence complained of in plaintiff's petition. That the fact, standing alone, of the sinking or falling of the bridge will not of itself be sufficient to justify you in finding the defendant guilty of negligence; but in addition to the fact that the bridge gave way you may take into consider-
265 ation the manner in which the bridge was constructed, the result of former floods upon it, the apparent condition of the bridge on the day of the accident, together with all of the other facts and circumstances appearing upon the trial.

14. In this case if you find for the plaintiff your judgment should be in such sum as would be a reasonable compensation for his pain and suffering if any, for his permanent injury, if any, his loss of time, if any, and his decreased capacity if any to earn a livelihood in the future. In other words, the plaintiff is entitled to recover an amount which will reasonably compensate him for all detriment, proximately caused by the injury, if you find for him, whether such damage could have been anticipated or not. But in any event, if you should find for the plaintiff, you should remember that the amount of your award should be reasonable and not excessive, and you should determine the rights of the parties to this action the same as though they were two private individuals and it is your duty to give to the defendant the same fair and unbiased consideration that you would give to it if it were a private individual and not a corporation.

15. You are the sole judges of the weight of the evidence and the credibility of the witnesses; and where two or more witnesses testify directly opposite to each other, you are not bound to regard the

weight of evidence as evenly balanced; but in determining the weight and credit that shall be given to the testimony of any witness, you may take into consideration his apeparance upon the stand, his manner of testifying, his apparent candor and fairness or lack of the same, his intelligence or lack of intelligence, his interest or lack of interest in the result of the action, his opportunities or lack of
266 opportunities for seeing and knowing the facts about which he testifies, and from all of the facts and circumstances appearing upon the trial, determine the weight and credit that shall be given to the testimony of any witness, and to give credit accordingly.

16. You are further instructed that if you find and believe that any witness had wilfully testified falsely relative to any material matter, you may disregard all of the testimony of such witness, except in so far as it may be corroborated by another credible witness or by other credible witnesses or by some fact or circumstances appearing upon the trial.

17. You will consider these instructions altogether, you have no right to consider any part or parts of them to the exclusion of other portions thereof. After you shall have retired to your jury room, you will select one of your number as foreman and when you have agreed upon a verdict, he will sign it as such, and you will all return with it into court.

You must be unanimous in your conclusions; unless you all agree no verdict can be found. Forms of verdict will be handed you by the Court.

This 30th day of October, 1903.

B. F. BURWELL, *Judge.*

Endorsed: #3548—In the District Court, Third Judicial District, Oklahoma County, Territory of Oklahoma—Wm. N. Wilson *vs.* McCabe & Steen Construction Company—Instructions to Jury—Given this 30th day of Oct., 1903, by B. F. Burwell, Judge—Filed in the District Court, Oklahoma County, this 30 day of October, 1903. B. D. Shear, District Clerk.

267 To the giving of each of said instructions numbered 2, 3, 4, 5, 8, 9, 10, 11, 13, or any, or all of them, the defendant then and there duly excepted; and no other instructions were given to the jury than as set forth in this case made at pages 199 to 207 both inclusive.

Thereupon the counsel for the respective parties duly argued said cause to the jury, at the conclusion of which the said jury retired to consider of their verdict, and thereafter, and on the 30th day of October, 1903, returned into said court their general verdict in favor of the plaintiff and against the defendant, together with their special findings of fact, which general verdict and findings of fact are set out in the journal entry of judgment in said cause as appears in this case made at pages 210 to 212, both inclusive.

Upon the return of said general verdict and special findings the court rendered judgment in favor of the plaintiff and against the

defendant for $5500.00 and the costs of said action; thereafter a journal entry of said judgment was prepared and spread of record in said court. A copy of said journal entry of judgment is as follows:

268 Be it remembered, that on the 30th day of October, 1903, the same being a juridical day of the September, 1903, Term of the district court in and for Oklahoma County, Territory of Oklahoma, present: Honorable B. F. Burwell, Judge: B. D. Shear, Clerk. Public proclamation of the opening of court having been ordered and given the following proceedings are had:

3548.

WILLIAM N. WILSON
vs.
MCCABE & STEEN.

The parties being present in court and represented by their respective counsel, comes the jury in charge of its sworn bailiff and returns the following verdict and special findings:

"In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

WM. N. WILSON, Plaintiff,
vs.
MCCABE & STEEN CONSTRUCTION COMPANY, Defendant.

Verdict.

"We, the jury drawn, empanelled and sworn in the above entitled cause, do upon our oaths find for the plaintiff and assess the amount of his recovery at $5500.00.

W. H. SKEED, *Foreman.*"

269 "Gentlemen of the jury you are instructed to answer the following interrogatories:

No. 1. Were the plans of the bridge on which the accident complained of occurred, such as a reasonably prudent man would have prepared for the purposes for which such bridge was intended and used?

Ans. 1. Not at that location.

W. H. SKEED, *Foreman.*

No. 2. Was the bridge in question designed or constructed as and for a permanent structure?

Ans. No. 2. No.

W. H. SKEED, *Foreman.*

No. 3. Were the plans for this bridge such as were usual and customary for the purposes for which this bridge was intended and used?

Ans. 3. We think not.

W. H. SKEED, *Foreman.*

No. 4. Was this bridge, on the 9th day of June, 1902, constructed in accordance with the plans furnished therefor?

Ans. 4. We do not know.

W. H. SKEED, *Foreman.*

No. 5. Did the parties who constructed this bridge act as reasonably prudent persons, under similar circumstances would have acted, in constructing this bridge according to such plans?

Ans. 5. No.

W. H. SKEED, *Foreman.*

No. 6. Did the engineers and inspectors of the railroad company oversee the construction of this bridge in the usual and customary manner in which such inspection and overseeing is done?

Ans. 6. No.

W. H. SKEED, *Foreman.*

No. 7 Did Mr. Pratt just prior to the accident complained of, advise the conductor, engineer or plaintiff, or either of them, that they could safely proceed to cross the bridge with the engine
270 and train?

Ans. 7. Yes.

W. H. SKEED, *Foreman.*

No. 8. If you answer interrogatory 7 in the affirmative, state whether or not before advising such conductor, engineer and plaintiff that they could safely proceed to cross the bridge, Mr. Pratt did not use reasonable care in ascertaining if the bridge was safe?

Ans. 8. He did not.

W. H. SKEED, *Foreman.*

No. 9. Did the parties, having immediate charge of the repairing of the bridge on June 9, 1902, exercise reasonable care and diligence to ascertain whether or not said bridge could be safely crossed by the train crew with the engine and train, at the time the attempt was made to cross said bridge with said engine and train?

Ans. 9. No. W. H. SKEED, *Foreman.*

No. 10. Were the tests that were used just prior to the coming upon the bridge by the engine and train such as were reasonably sufficient to test the strength and security of the bridge.

Ans. 10. No. W. H. SKEED, *Foreman.*

No. 11. Were the tests such as usually adopted by railroad men in testing the security of bridges?

Ans. 11. No. W. H. SKEED, *Foreman.*

No. 12. Did the plaintiff use ordinary prudence and care for his safety in remaining in the cab of the engine after he had been advised with reference to the condition of the bridge, and had been informed that he could get off of the engine and follow the train across the bridge and then catch the caboose?

Ans. 12. Yes.

W. H. SKEED, *Foreman.*

271 No. 13. If the plaintiff had followed this plan, would he have been injured at that time?

Ans. 13. No.

W. H. SKEED, *Foreman.*

No. 14. If you find for the plaintiff, how much do you find for past loss of service?

Ans. 14. $1200.00.

W. H. SKEED, *Foreman.*

No. 15. If you find for the plaintiff, how much do you find for future loss of service?

Ans. 15. $1500.00.

W. H. SKEED, *Foreman.*

No. 16. If you find for the plaintiff, how much do you find for physical pain and anguish?

Ans. 16. $2800.00.

W. H. SKEED, *Foreman.*

The clerk now reads said verdict and special findings aloud in open court and it is ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of $5500.00 together with the costs of this action, for which let execution issue.

272 Be it further remembered that within three days of the rendition of said judgment, and during the said November term of 1903, of said District Court, and on to wit, the 2nd day of November, 1903, the said defendant filed in said court and in the office of the clerk thereof, its written motion for new trial in said cause, together with affidavit of the delivery to one of the attorneys of the plaintiff, a copy thereof, which motion and affidavit was in words and figures as follows, to wit:

TERRITORY OF OKLAHOMA, *Oklahoma County*, ss:

In the District Court of the Third Judicial District of Oklahoma Territory, Sitting in and for Oklahoma County.

Case No. 3548.

WILLIAM N. WILSON, Plaintiff,
vs.
McCABE & STEEN CONSTRUCTION COMPANY, a Corporation, Defendant.

Comes now the defendant, McCabe & Steen Construction Company, a corporation, by its attorneys, and moves the court to grant it a new trial in the above entitled and numbered cause and to set aside the verdict of the jury heretofore, to wit, on the 30th day of October, A. D. 1903, returned in said cause, and says that the said defendant was aggrieved by the verdict, and the judgment entered thereon and that the substantial rights of the defendant are materially affected by the following causes, which it urges as grounds for a new trial, as follows, viz.

273 First. Defendant shows to the court that the jury, in considering said cause, after they had received the charge of the court and hearing the argument of the counsel and had retired to consider of their verdict, and before they had returned their verdict into court, were permitted to separate and were not kept together under the charge of an officer until they agreed upon a verdict, and were not ordered by the court to be separated, all of which is contrary to Article 4168 of the statutes of Oklahoma and all of which were prejudicial to the substantial rights of said defendant.

Second. Because the verdict is not sustained by sufficient evidence in this:

(1) That not any negligent act on the part of the defendant was pointed out, specified or shown by the evidence; that the plaintiff closed his case without offering any evidence whatever, tending to show that defendant was guilty of negligence, unless the happening of the accident is, in itself, to be considered as evidence of that fact, and defendant says that the happening of the accident in itself is not evidence of negligence, and is not sufficient evidence upon which to base a verdict or sustain one; and because further, all of the evidence offered by the defendant tended to prove that the bridge had been constructed in accordance with approved plans furnished by competent engineers and under the supervision of a competent engineer and that they were such as are usually adopted by railroad companies and were better suited that any others for the place and purpose where and for which they were intended, and that the said structure was tested in the manner usually adopted, and considered sufficient by persons skilled in such matters.

274 (2) That said verdict was contrary to law in this, that the evidence plainly showed that the plaintiff, by the use of ordi-

nary care and foresight, might have avoided the injury, by accepting the invitation of the engineer to leave the engine and ride across the bridge upon the caboose.

(3) That the verdict was contrary to law in this, that the evidence plainly shows that the plaintiff assumed all of the risks attendant upon crossing said bridge and was aware of whatever dangers were incident to crossing same, and was clearly aware with the defendant and with its agents and other employees, of whatever danger was attendant upon crossing the bridge.

(4) That the verdict was contrary to law in this, that the plaintiff relied upon his own judgment and upon the judgment and advice of the engineer Waters and upon the statements of Pratt and Fallahay, which were reported to him by Waters, all of whom were fellow servants of the plaintiff, for while the said Fallahay may not have been the fellow servant of plaintiff in the actual repairing of said bridge, which is denied by the defendant, yet, after the repairs were completed, he was a fellow servant of the plaintiff with reference to any statements or advise that he might make with reference to the condition of said bridge, and had no authority from the master to make any such statements, representations or assurances respecting the safety of said bridge, and the said Pratt had no authority whatsoever, either with reference to the repairing of said bridge or with reference to making any declarations or statements respecting same.

275 (5) That said verdict is contrary to law, in this, that the evidence shows that the plaintiff had full knowledge of the rise in said stream and of the sinking of one bent of said bridge prior to his going thereon, but that the defendant had no knowledge of the rise in said stream, or the dangerous or suspicious condition of said bridge.

(6) That said verdict is contrary to law, in this, that the evidence does not show any facts or circumstances, carrying notice to the defendant of the rise in said stream, or any fact or circumstance indicating that defendant ordered the plaintiff to cross said stream in the risen or dangerous condition, but tends to show that the first bridge was disturbed by drift and not by wash-out, and that defendant had taken every precaution to protect the repaired bridge from drift, and had protected it from drift and had no reason to apprehend that a second or other rise would affect the bridge differently from the manner in which it was affected by the former rise in the river, and further, that it had issued to the train men and caused to be posted, a bulletin, of which plaintiff and the other train men in charge of said train, had full notice, to the effect that before crossing the bridge upon the South Canadian River, all trains must be stopped and the train men must see that said bridge was safe and clear.

(7) That said verdict is contrary to law in this, that if the plaintiff had used due and reasonable precautions for his own safety, that he would not have been hurt; that he assumed the risks attendant upon the crossing of said bridge and that in crossing the same, he relied upon the advice and directions other than those of the master.

(8) The special verdict is contrary to the general verdict and the general verdict is not sustained by the special verdict.

276 Third. Because certain errors of law ocurred upon the trial of said cause and were excepted to in open court at the time of their occurrence, the same are specified as follows, viz:

A. The court erred in permitting the introduction of testimony, as follows:

(1) The Court erred in overruling the defendant's motion to exclude the testimony of the plaintiff's witness, Tuck Waters to the effect that the man Pratt was the superintendent of construction of the defendant, it having appeared from the testimony that the statement so made by the said Waters was based upon hearsay and upon a statement of said Pratt and was not based upon any statement made by the defendant or upon any competent evidence of the offices or duties performed by the said Pratt.

(2) The Court erred in refusing to grant defendant's renewed motion to exclude the testimony of said Waters to the effect aforesaid, upon a fuller examination into the grounds for such testimony and upon its clearly appearing that such grounds were hearsay.

(3) The Court erred in permitting said Waters, over defendant's objection, to testify that before going upon said bridge, he told the plaintiff Wilson that the man Pratt and the man Fallahay had stated to him that the bridge was safe, neither the defendant or any officer of the defendant being present, and the defendant could not be bound thereby, because said Pratt and Fallahay were fellow servants of the said plaintiff, Wilson, with reference to the repairs on said bridge, it having appeared that said Wilson was also engaged in assisting in the construction of said bridge by hauling material and supplies to be used thereon, and because said Pratt and Fallahay were fellow servants of the plaintiff Wilson in any assurance that they gave respecting the safety of said bridge; and because

277 it does not apear from the evidence that said Pratt or Fallahay had any authority to give any assurances to the plaintiff Wilson concerning the safety of said bridge, and because said Pratt had no authority with reference to the construction of said bridge, and because it does not appear from the evidence that the said Fallahay had any authority with reference to the movement of trains; and because the tests used upon said bridge, and upon which tests the judgment of the said Pratt and Fallahay was based had been witnessed by the plaintiff and were known to him alike as to the others.

(4) Because the Court erred in permitting the plaintiff Wilson to testify to the conversation between himself and the engineer Waters, over the objection of the defendant, to the effect that the man Pratt and the man Fallahay had told the witness Waters that the bridge was safe, all of which was objectionable for the reasons set forth in section 3 hereof.

(5) Because the Court erred in permitting the plaintiff Wilson to testify that he would not have gone on to the bridge but for the statement of said Pratt and Fallahay reported to him by the said Waters.

B. The court erred in overruling defendant's demurrer to the evi-

dence offered by plaintiff upon the close of plaintiff's testimony because the evidence was wholly insufficient to sustain a verdict on behalf of the plaintiff, for the reasons set forth in said demurrer.

C. Because the court erred in sustaining certain objections made by the plaintiff to testimony offered in behalf of the defendant and in excluding said testimony from the consideration of the jury, as follows, viz:

278 (1) In sustaining the objection of the plaintiff to the testimony of V. E. Steen offered by the defendant, to the effect that the plaintiff Wilson was not under the employ of the defendant at the time that he was injured, but was under the employ of McCabe & Steen, a partnership, and that the defendant corporation was not then in existence?

(2) In sustaining plaintiff's objection to the testimony of witness V. E. Steen offered by the defendant, to the effect that at the time of the injury, to wit, on the 9th day of June, 1902, the defendant had no contract for building a railroad from Oklahoma City to Quanah, Texas, and was not then engaged in the work of constructing the same, and had no contract for the building of said bridge and was not then engaged in the work of constructing the same.

(3) In sustaining the objection of the plaintiff to the testimony of the witness V. E. Steen offered by the defendant, to the effect that the said Pratt and Fallahay were not at the time of the accident, in the employ of the defendant, or servants of the defendant, but that at that time, were under the employ of McCabe & Steen, a partnership.

D. Because the Court erred in refusing the application of the defendant to amend its answer and peading so that the fact that the plaintiff Wilson and the man Pratt and the man Fallahay and the engineer Waters could be shown not to have been employed by the defendant at the time of the happening of the accident on June 9, 1903, and so that the evidence offered on that issue by the defendant could be admitted by the Court, so that the defendant could offer evidence to the effect that it had no contract at that time for the construction of a railroad, or any part of the same, between

279 Oklahoma City and Quanah, Texas, and had no contract at that time for the construction of a bridge over the South Canadian River, and was not operating trains or doing any other work thereon, or connected therewith, all of which more fully appears from the application and motion made in writing by the defendant in open court before defendant closed its evidence and upon the adverse ruling of the court to the effect that the evidence as aforesaid, upon which it had relied, could not be introduced under its pleading.

E. The Court erred in refusing to give certain charges requested by the defendant, as follows, viz.:

(1) In refusing to give charge No. 1 requested by the defendant, filed with the clerk and made a part of the record.

(2) In refusing to give special instruction No. 2 requested by defendant, filed with the clerk and made a part of the record.

(3) In refusing to give special instruction No. 3 requested by defendant, filed with the clerk and made a part of the record.

(4) In refusing to give special instruction No. 4 requested by defendant, filed with the clerk and made a part of the record.

(5) In refusing to give special instruction No. 5 requested by defendant, filed with the clerk and made a part of the record.

(6) In refusing to give special instruction No. 6 requested by defendant, filed with the clerk and made a part of the record.

(7) In refusing to give special instruction No. 7 requested by defendant, filed with the clerk and made a part of the record.

(8) In refusing to give special instruction No. 8 requested by defendant, filed with the clerk and made a part of the record.

(9) In refusing to give special instruction No. 9 requested by defendant, filed with the clerk and made a part of the record.

280 (10) In refusing to give special instruction No. 10 requested by defendant, filed with the clerk and made a part of the record.

(11) In refusing to give special instruction No. 11 requested by defendant, filed with the clerk and made a part of the record.

(12) In refusing to give special instruction No. 12 requested by defendant, filed with the clerk and made a part of the record.

(13) In refusing to give special instruction No. 13 requested by defendant, filed with the clerk and made a part of the record.

(14) In refusing to give special instruction No. 14 requested by defendant, filed with the clerk and made a part of the record.

(15) In refusing to give special instruction No. 15 requested by defendant, filed with the clerk and made a part of the record.

(16) The court erred in rejecting the interrogatories asked by the defendant & in not submitting them to the jury.

F. The court erred in the instructions given to the jury in the following particulars, viz.:

(1) The Court erred in paragraph No. 2 of the charge, wherein he stated "Then and in that event, it was the duty of the defendant to see to it that the bridge was put in safe condition," because the same was contradicted by paragraph 10 of the charge and there was no evidence in the record that the defendant built, or was under obligation to repair said bridge.

(2) The Court erred in paragraph 2 of the charge, wherein he stated "Without taking steps to ascertain as to whether or not it was safe or unsafe" because the evidence showed that defendant took steps to determine whether it was safe or unsafe and the statement quoted was suggestive and misleading.

(3) The Court erred in paragraph 2 of the charge, wherein he stated that defendant "Caused the plaintiff to cross the bridge with his train," because there is no evidence that the defendant

281 caused the plaintiff to cross the bridge with his train, but the same was an act of a fellow servant.

(4) The Court erred in paragraph 2 of the charge wherein he used the following language: "Unless you further find that he himself was guilty of contributory negligence," because the effect of the same was to exclude from the consideration of the jury every defense offered by the defendant, except contributory negligence on the part of the plaintiff.

(5) The Court erred in paragraph 3 of the charge in using the following language: "Still where an employee is not engaged in the construction of such road or bridge, but is engaged in working on such train as fireman," because the evidence showed that the employee was engaged in assisting in the construction and repairing of the bridge by hauling materials thereto.

(6) The court erred in paragraph 2 of the charge, because the whole paragraph fails to recognize the fellow servants doctrine as applied to plaintiff's right to recover, and bases plaintiff's right to recover in part, upon defendant's knowledge of the condition of the bridge at the time of the acident, when all of the evidence showed that defendant was not present by any authorized representative and that the dangers which threatened the stability of the bridge had arisen during defendant's absence therefrom, and because the whole paragraph is contradicted by paragraph 10 of the charge and is inconsistent therewith by the evidence which sustains paragraph 10.

(7) The Court erred in paragraph 4 of the charge, because the same is in conflict with paragraph 10 thereof, and the evidence which sustains paragraph 10 is inconsistent therewith; and because there is no evidence upon which to base the charge with reference to
282 the defendant being in possession of knowledge of facts and circumstances that would cause an ordinarily prudent person to investigate and having been shown that no representative of the defendant other than fellow servants of the plaintiff were present at the bridge.

(8) The Court errod in paragraph 5 of the charge in that portion, beginning with "Unless you further find that after the erection of such bridge" etc., because if the falling of the bridge was occasioned by high water that arose the night before the accident, the plaintiff could not recover, because he had no pleading in the case presenting this phase of the right to recover.

(9) The Court erred in paragraph 8 of the charge to the jury, wherein he uses the following language "But on the other hand, the mere fact that the bridge may have withstood the test usually adopted would not excuse the defendants" etc., because there was no evidence that the defendant was in possession of other facts and circumstances which would cause a prudent person to have a well grounded apprehension of danger, and said charge was, in that respect, suggestive of conditions not justified by the evidence, and further because said charge suggests that an investigation would have led to the discovery of defects and avoided the injury, there being no evidence to sustain such a suggestion the evidence having shown conclusively that the ordinary tests were resorted to and that the bridge withstood such tests.

(10) The Court erred in paragraph 9 of the charge in qualifying the statement "That if the bracing and supports of the bridge were reasonably sufficient and were placed in the usual and customary manner, and the falling of the bridge was caused by washing away of the dirt between or around the supports, that they must find for

defendant" because this is the only phase of the case presented
283 by the plaintiff's petition, and the petition will not support the judgment rendered upon any other phase of the evidence, and because there was no duty on defendant to discover hidden defects in bridge, defendants not having built or repaired the same and it not having been shown that any duty rested upon the defendant to investigate the manner in which said bridge had been constructed or repaired, and because said paragraph charges that the duty was upon the defendant to use care to avert the falling of the bridge, whereas, no such duty devolved upon the defendant it not having constructed or repaired the bridge, therefore had no duty to avert the falling thereof.

(11) The Court erred in paragraph 10 of the charge wherein he charges the jury that if the defendant knew the construction of the bridge it would be guilty the same as though it had caused it to be built. There is no evidence that defendant knew the construction of the bridge but the evidence being wholly to the contrary, the evidence having shown that the defendant had nothing to do with the construction of the bridge and knew nothing about it, and said paragraph 10 is further erroneous in this, that the Court charged the jury that the defendant was estopped from denying that it was operating the train in question" because there is no law nor allegation in the pleading which estop the defendant from denying or proving under a general denial that it was not operating the train in question.

(14) The Court erred in paragraph 11 of the charge wherein he tells the jury "All of the train men would not have to stop and examine the bridge" under the direction of the bulletin, because the court should have told the jury that the examination of the bridge by all the train men would be an act of a fellow servant for the negligent performance of which, plaintiff could not hold the defendant liable.

284 (15) The Court erred in paragraph 11 of the charge in using the following language: "If the general superintendent of the defendant was present and advised the train crew that the bridge was safe and signalled the train men to cross over" the bulletin was sufficiently complied with, because there was no evidence that the defendant had present a general superintendent, or one authorized to act for the defendant in reference to the matters referred to, but all of the evidence was to the contrary, and if the defendant is mistaken in saying that all of the evidence was to the contrary, then defendant says that the evidence as to the authority of the man Pratt was conflicting, and the Court in his charge, assumes the evidence to have been one way as if it had been conclusively shown by the evidence that Pratt was the general superintendent of the defendant, that such charges is upon the weight of the evidence and takes away from the consideration of the jury, the issue made by the evidence, if one was made, as to Pratt's authority, but in fact tells the jury to take for granted the fact that Pratt was the general superintendent of the defendant; and said construction is further erroneous in this, that there was no evidence that Pratt signaled said trainmen to cross over the bridge, and said instruction

is further erroneous in this that it invades the province of the jury in stating to the jury that the order in question was sufficiently complied with, which was a question which should have been submitted to the jury for their determination.

(16) The Court erred in paragraph 13 of the charge, because the same is upon the weight of the evidence.

G. Defendant prays the court to grant it a new trial, because of errors of law committed upon trial of said cause and duly excepted to at the time.

Wherefore, defendant shows to the court that by reason of
285 the facts herein set forth, it has been materially and substantially wronged in the trial of said cause, and prays that the verdict brought in by the jury and the judgment rendered thereon be set aside and held for naught and that a new trial be granted the defendant in said cause, as in duty bound, it will ever pray.

MOSELEY & EPPSTEIN,
SNYDER & CLARK,
Attorneys for Defendant.

I solemnly swear that heretofore on this day I delivered to Mr. Wells one of the attorneys for plaintiff a copy of this motion.

A. G. MOSELEY.

Subscribed & sworn to before me this 2nd day of Nov., 1903.
[SEAL.] B. D. SHEAR, *Clerk.*

Endorsed: #3548—In the District Court of Oklahoma County, Okla. Ter.—Wm. N. Wilson, Pl'ff *vs.* McCabe & Steen Construction Company, Def't.—Motion for new trial—Filed Nov. 2, 1903. B. D. Shear, Clerk.

286 Thereafter, and on the 10th day of November, 1903, further proceedings were had in said cause, as appear from the records of said Court and the journal entry thereof, which is in words and figures as follows, to wit:

Be it remembered, That on the 10th day of November, 1903, the same being a juridical day of the regular September, 1903, Term, of the District Court in and for Oklahoma County, Territory of Oklahoma, Present; Honorable B. F. Burwell, Judge; B. D. Shear, Clerk; Public proclamation of the opening of court having been ordered and given the following among other proceedings are had:

3548.

WILLIAM N. WILSON
vs.
MCCABE & STEEN.

The motion of the defendants for a new trial coming before the court, and the court being advised, it is ordered that said motion be

and the same is hereby overruled, to which the defendants except. On application the defendants are given ninety days in which to make and serve a case made on appeal to the Supreme Court of the Territory of Oklahoma; the plaintiff is given ten days thereafter in which to suggest amendments thereto and said case made shall be signed and settled on five days' written notice by either party. Ordered further that the defendants be and they are hereby given thirty days in which to execute a stay bond.

287 That thereafter on the 2nd day of February, 1904, good cause being shown therefor, an order was made extending the time in which defendant might make and serve a case made on appeal to the Supreme Court of the Territory of Oklahoma, which order is in words and figures as follows:

TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting within and for the County of Oklahoma.

No. 3548.

WM. L. WILSON, Plaintiff,
vs.
MCCABE & STEEN, Defendants.

Order Extending Time.

And now on this 2nd day of February, 1904, it having been made to appear to the court that the defendants in the above numbered and entitled cause, intend to appeal from the judgment of the court below to the Supreme court of the Territory, and have filed notice of their said intention, and that on the 10th day of November, 1903, an order was made and entered in this court, giving said defendants ninety days within which to make, serve and file a case made on appeal from said judgment to said Supreme Court; and it further appearing to the court that the official stenographer of this court, on account of press of other business, has made a showing to the court that he has not had sufficient time within which to make a transcript of the evidence taken on the trial of said cause, to be used on said appeal, and that it is necessary that an extension be granted to effect said purpose, and the court being fully advised in the premises and for good cause shown does hereby,

Order and decree that the time heretofore allowed within
288 which the defendant was permitted to make, serve and file a case made on appeal to the Supreme Court be and is hereby extended for a period of ninety (90) days from and after the expiration of the time heretofore allowed for said purpose.

B. F. BURWELL, *Judge.*

Filed November 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: #3548—Wilson *vs.* McCabe & Steen—Order extending time to make case—Filed in District Court, Oklahoma County, O. T., Feb. 2, 1904. B. D. Shear, Clerk, By Will. H. Clark, Dpeuty.

289 That thereafter on May 6th, 1904, good cause being shown therefor, an order was made extending the time in which defendants might make and serve a case made on appeal to the Supreme Court of the Territory of Oklahoma, which order is in words and figures as follows:

TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

In the District Court of said County.

No. 3548.

WM. N. WILSON, Plaintiff,
vs.
THE MCCABE & STEEN CONSTRUCTION CO., a Corporation, Defendant.

Order Extending Time.

And now on this the 6th day of May, A. D. 1904, the same being one of the days of the regular April, 1904, term of said court, it having been made to appear to the court by application of the defendant for an extension of time within which to make, serve and file a case made in the above entitled cause in the Supreme Court of the Territory, on appeal thereto, that the time heretofore allowed for such purpose is insufficient and the court being fully advised in the premises and due cause being shown, it is therefore,

Ordered that the time for making, serving and filing said case made on appeal to said Supreme Court by the defendant, be and the same hereby is extended for a period of sixty (60) days from and after the expiration of the time heretofore allowed by the court for said purpose.

Witness my hand.

B. F. BURWELL,
Judge, 3rd Jud. Dist., O. T.

Endorsed: #3548—Wm. N. Wilson *vs.* McCabe & Steen Construction Co., a corporation,—Order of court extending time—Filed May 6, 1904. B. D. Shear, Clerk—Filed Nov. 5, 1904, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

290 Thereafter, and on the 5th day of July, A. D. 1904, good cause being shown there for, an order was made by the Judge of said court, extending the time in which the defendant might make a case made on appeal to the Supreme Court of the Territory of Oklahoma, which order is in words and figures as follows, to wit:

291 TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

In the District Court of said County.

No. 3548.

WM. N. WILSON, Plaintiff,
vs.
THE McCABE & STEEN CONSTRUCTION CO., a Corporation, Defendant.

Order Extending Time.

And now on this the 5th day of July, A. D. 1904, the same being one of the regular days of the April, 1904, term of said Court, it having been made to appear to the court that the time heretofore allowed to the appellant in the above entitled cause, namely: McCabe and Steen Construction Company, a corporation, within which to make and serve and file a case-made on appeal from this court to the Supreme Court of the Territory, is insufficient, and application having been made for the further extension of said time to effect *effect* said purpose, and due cause having been shown, and the court being fully advised in the premises it is therefore;

Ordered, by the court that the time heretofore allowed within which to make and serve and file a case-made by the said appellant McCabe and Steen Construction Company, a corporation in the Supreme Court, be and is hereby extended for a period of sixty days, from and after the expiration of the time granted in the last order of extension.

Witness my hand this the 5th day of July, A. D. 1904.

B. F. BURWELL,
Judge of the District Court.

Endorsed: 3548. Order extending time. Filed in District Court, Oklahoma County, O. T. Jul- 5, 1904. B. D. Shear, Clerk by Will H. Clark, Deputy.

TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

292 I, B. D. Shear, Clerk of the District Court within and for the county and Territory aforesaid, do hereby certify the above to be a full, true, complete and correct copy of the original order extending time in the case of Wilson *vs.* McCabe & Steen as the same appears on file and of record in my office.

Witness my hand and seal this the 30th day of August, 1904.

[SEAL.]

B. D. SHEAR,
Clerk District Court.

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*
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293 Thereafter, and on the 30th day of August, 1904, good cause being shown therefor, an order was made extending the time in which the defendant might make and serve a case made on appeal to the Supreme Court of the Territory of Oklahoma, which order is in words and figures as follows, to wit:

294 TERRITORY OF OKLAHOMA, *Oklahoma County:*

In the District Court.

WM. N. WILSON, Plaintiff,
vs.
THE MCCABE & STEEN CONSTRUCTION CO., a Corporation, Defendant.

Order Extending Time.

Now on this 30th day of August, A. D. 1904, it having been made to appear to the court that the time heretofore allowed in which to make and serve a case made on appeal to the Supreme court of the Territory of Oklahoma in the above entitled case, is insufficient, and application having been made for the further extension of said time, and good cause being shown therefore;

It is ordered, by the court, that the time heretofore allowed the appellant in which to make and serve a case-made on appeal to the Supreme Court of the Territory of Oklahoma be and the same is hereby extended thirty (30) days after the expiration of the time heretofore allowed; the plaintiff is given ten days thereafter in which to suggest amendments thereto and said case-made shall be signed and settled on five days' written notice by either party.

Done this the 30th day of August, 1904.

B. F. BURWELL,
Judge of District Court.

295 TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

I, B. D. Shear, Clerk of the District Court in and for the County and Territory aforesaid, do hereby certify the above and foregoing to be a full, true, complete and correct copy of the original order extending time in case of Wilson *vs.* McCabe & Steen as the same appears on file and of record in my office.

Witness my hand this the 30th day of August, 1904.

[SEAL.]

B. D. SHEAR,
Clerk of District Court.

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

296 The above and foregoing document, consisting of 234 pages of partly written and partly type-written matter, including

the photographic exhibits, and numbered consecutively from 1 to 234, both inclusive, contains all the pleadings in the therein entitled action, all the evidence that was introduced upon the trial of said cause, all the exceptions taken to the rulings of the Court upon said trial and in said cause, all of the special instructions requested by either side as well as all the instructions given to said jury by the court, the verdict of the jury, all orders, rulings, findings and judgments of the Court in said cause, and a true and correct statement of all of the proceedings had therein; all of same, including this paragraph is prepared and intended for and as a true and correct case made for the Supreme Court of the Territory of Oklahoma, in the therein entitled cause.

To William N. Wilson, plaintiff in the above-entitled cause, and John H. Wright, Esq., and Messrs. Shartel, Keaton & Wells, his attorneys:

We hand you herewith for your examination and suggestions of any amendments you may desire to have made, the above and foregoing case made for the Supreme Court of the Territory of Oklahoma in the cause therein entitled.

McCABE & STEEN CONSTRUCTION COMPANY,
By MOSELEY & EPPSTEIN, *Its Attorneys.*

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

We hereby acknowledge due service of the above and foregoing case made this 3rd day of October, 1904, and waive the suggestion of amendments and agree that same be settled and signed
297 at any time without further notice.

SHARTEL, KEATON & WELLS,
Attorneys for Plaintiff.

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

298 I, B. F. Burwell, Judge of the District Court of the Third Judicial District of the Territory of Oklahoma, do hereby certify that on this 1st day of November, 1904, there appeared before me in open court in the city of Oklahoma City, in the county of Oklahoma and said Territory of Oklahoma, Moseley & Eppstein, representing the above named defendant, McCabe & Steen Construction Company, a corporation, and John H. Wright, Esq., and Messrs. Shartel, Keaton & Well, representing the above named plaintiff, William N. Wilson, and presented to me the within and foregoing document, consisting of 235 pages of partly written and partly type-written matter, including photographic exhibits, requesting that

the same be settled and signed by me as a case made in the therein entitled cause for the Supreme Court of the Territory of Oklahoma, and after examination thereof, I hereby further certify that I am judge who tried said cause, that the said document was duly served by the defendant within the time given by the Court, and as extended by me, and that no suggestions of amendment thereto have been made or are desired and I hereby settled and sign said document as a case made in the therein entitled cause for the Supreme Court of the Territory of Oklahoma, and direct the Clerk of said District Court to attest and file the same in his office and the- thereafter, upon demand therefor, deliver said case made to the said Moseley & Eppstein, to be attached by them to their petition in error to the Supreme Court.

B. F. BURWELL,
[SEAL.] *Judge of Third Judicial District of Territory of Oklahoma.*

Attest:
B. D. SHEAR,
Clerk of the District Court of Oklahoma County.

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

299 Case-made endorsed on the back as follows: The foregoing case made filed in the District Court of Oklahoma County, Territory of Oklahoma, November 1, 1904. B. D. Shear, Clerk.

Filed Nov. 5, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

300 And thereafter, at the June, 1905, Term of said Supreme Court, on the Sixth day of June, 1905, the following proceeding was had in said cause, to wit:

#1640.

McCABE & STEEN CONSTRUCTION COMPANY, Plaintiff in Error,
vs.
WILLIAM N. WILSON, Defendant in Error.

Ordered by the Court, that this cause be now taken on record and briefs.

301 And thereafter, at the June, 1906, Term of said Supreme Court, on the sixth day of September, 1906, the following proceeding was had in said cause, to wit:

#1640.

McCABE & STEEN CONSTRUCTION COMPANY, Plaintiff in Error,
vs.
WILLIAM N. WILSON, Defendant in Error.

And now this cause comes on for final determination and decision by the court upon the record and briefs submitted therein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the District Court of Oklahoma County, Territory of Oklahoma, in this cause, should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the Oklahoma County District Court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Gillette, J. All the Justices concurring except Burwell, J., who presided in the trial of the cause in the Court below, not sitting.

Which opinion reads in words and figures as follows, to wit:

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No. 1640.

In the Supreme Court of the Territory of Oklahoma, June Term, 1906.

Filed September 6, 1906.

McCABE & STEEN CONSTRUCTION COMPANY, Plaintiff in Error,
vs.
WILLIAM N. WILSON, Defendant in Error.

Syllabus.

1. *Instructions to Jury—Exceptions to.*—Where several instructions to the jury are requested, and the court refuses to give any of them, a general exception to such refusal will not be sufficient on appeal to raise the correctness of such ruling in this Court.

2. *Pleading—Verification of—When Necessary.*—Where a petition alleges that one P was defendant's superintendent of construction, and one F was its foreman of a bridge gang, and where the statute provides that: "In all actions allegations of any appointment or authority, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney," and the answer is an unverified general denial, coupled with a plea of contributory negligence, such pleading is not sufficient to entitle defendant to prove that P was not its superintendent, and F was not its foreman of a bridge gang.

3. *Master and Servant—Liability of.*—A railroad company is bound to provide suitable and safe material and structures in the construction of its road and appurtenances, and if from a

defective construction thereof an injury happens to one of its servants, the company is liable therefor. The servant, on his part, undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risk of the negligence of the master itself. (Following U. P. Ry. Co. *v.* O'Brien, 161 U. S., 451.)

Error from the District Court of Oklahoma County.

B. F. Burwell, Trial Judge.

Affirmed.

A. G. Mosley, Louis B. Eppstein, for plaintiff in error.
Shartel, Keaton & Wells, and John H. Wright, for defendant in error.

Statement of Facts.

This is an action wherein the defendant in error, Wm. N. Wilson, seeks to recover damages from the plaintiff in error, McCabe and Steen Construction Company, for injuries that he claims to have received while acting in the capacity of a locomotive fireman, for the said Construction company. The defendant in error was a locomotive fireman, and for some months prior to the accident in question was firing on a construction engine. A new line of railroad was being constructed by the Oklahoma City and Western Railroad Company from Oklahoma City to Quanah, Texas. It was on this new line of road that fireman Wilson was firing the engine of a construction train. The road had been constructed, and the steel laid to a point south or west of the Canadian river. The Canadian river had been bridged some months prior to the accident, and shortly before the accident a span or two of the bridge had been washed out. On the morning of June 9th, 1902, the construction train, with Tuck Waters as engineer and the defendant in error, William N. Wilson, as fireman, started out of Oklahoma City with a construction train, bearing cars of material and workman, and headed for its day's labor upon the line of road. When the train arrived at the Canadian river, it stopped, and finding that the river was quite high the engine was cut off from the rest of the train and the engineer directed to go over the bridge and pick up a loaded car on the other side and bring it back. The engineer moved his engine onto the bridge, cautiously, and when approaching the center of the stream the bridge began to give away, and the engineer reversed his engine and ran back off the bridge. When this construction train arrived at the bridge it found Mr. Fallahay, the foreman in charge of the bridge work, there on the ground with a gang of men, and Mr. Pratt, the general superintendent of construction, was on the train in question, having come out of it, from Oklahoma City. After the engineer had backed his engine off the bridge, Mr. Fallahay and his bridge gang, assisted by Mr. Pratt, the superintendent, proceeded to repair the bridge, and

after working upon the same for an hour and a half, con-
303 structing what is known as a "false span," they told the engineer and fireman that the bridge had been repaired, and directed them to proceed. The engineer then made specific inquir-es both of the superintendent of the bridge gang and of Mr. Pratt, the general superintendent, as to the sufficiency of the bridge, and informed them that he was not a bridge builder, and would have to rely upon them. They assured him that the bridge was all right, and directed him to go ahead. With this assurance the engineer and fireman took their places in the engine, and cautiously ran onto the bridge. When directly over the main channel of the river and over the "false span" that had been built, the bridge gave away and the engine, with the engineer and fireman Wilson, went to the bottom of the river. By the exercise of the greatest effort, fireman Wilson escaped with his life but his legs were broken in two or three places, and he was otherwise very seriously and permanently injured. For the injuries received on this occasion, the defendant in error, Wm. N. Wilson, brought this action in the court below, charging negligence on the part of the defendant railway company, and in the trial of the cause in the court below he recovered judgment for $3000.00, and to reverse said judgment the plaintiff in error, the construction company, brings the case to this court.

Opinion of the court by

GILLETTE, *J.*:

The first assignment of error is the refusal of the court below to give the instructions presented and asked for by the defendant construction company. The record discloses the request for these instructions and then recites:

"Whereupon the court refused to give said instructions, or any of them, to the jury, to which ruling and refusal of the court the defendant then and there duly excepted."

Our statute prescribed the method of taking exceptions to instructions, and in order to make up a record preserving exceptions to refused instructions, there must be a substantial compliance with the provisions of the statute, and it is claimed, by the defendant in error in this case, that the general exceptions to the refusal of the instructions, as above set forth, does not amount to a substantial compliance with the statute. Our statute was taken from Kansas, and before we adopted it, the Supreme Court of Kansas had construed the same, and that construction is presumed to have been adopted here, with the adoption of the Kansas code, and in addition to that the construction placed upon the statute by the supreme court of Kansas meets our hearty endorsement.

"Where a party asks the court to give several separate written instructions to the jury, and the court refuses to give any of them, and a general exception is taken to such refusal, *Held*, that the exception is not sufficient."—Bailey *v.* Dodge, Kansas 72.

The exception that was under consideration in the Kansas case above cited, is so nearly like the one in question here that it is a case exactly point. It is as follows:

"The above and foregoing are all instructions asked by the defendant, each and all of which were refused by the court, and to such ruling and refusal said defendant duly excepted."

The supreme court of Kansas in the above cited case held such a general exception insufficient, and that under it, the error of refusing the instructions requested was not brought before the court. To the same effect see the case of Fleming *v.* Latham, 48 Kans. 773. Though not exactly in point in this case, we think our own court has fairly indicated its position by its expression as contained in: Everett *v.* Aikens, 8 Okla., 184; Glaser, *et al.*, *v.* Glaser *et al.*, 13 Oklahoma, 389. We are clearly of the opinion that the general exception to the instructions refused is not sufficient to present the error complained of in refusing them, to this court.

The next ground of complaint is that the court below erred in refusing to allow the defendant construction company to prove that Pratt was not its superintendent of construction, and that Fallahay was not its foreman of the bridge gang, and that the plaintiff, Wm. N. Wilson, was not employed by the defendant construction
304 company, and that they were the servants in the employ of McCabe & Steen. The rulings complained of arise from the condition of the pleadings. The petition of the plaintiff contains the allegation that said J. Pratt was the general superintendent of construction for defendant, and that said Fallahay was the foreman of the bridge gang for the defendant. It also contains the allegation that the plaintiff was employed by said defendant, through J. Pratt, the general superintendent of construction of defendant. The answer of defendant contains, first, an unverified general denial, and, second, an allegation that the injury, if sustained at all by plaintiff, which is denied, was caused and brought about by the carelessness and negligence of a fellow servant of plaintiff, and that defendant is not therefore liable; and, third, a special allegation that if the plaintiff was injured at all, which is denied, the said injury so received by him was not due to the negligence or want of care of this defendant, or any of its employees, but was due to one of the risks assumed by the plaintiff in his contract of employment with this defendant, and for which this defendant is in no way liable; and, fourth, a plea of contributory negligence. Under the pleadings, as thus made up, the court instructed the jury that the defendant was estopped from claiming that Fallahay, the foreman of the bridge gang; Pratt, the general superintendent of construction, and the plaintiff, were in the employ*ee* of the defendant. Concerning the verification of pleadings section 3986 of our statute provides:

"In all actions allegations of the execution of written instruments and the endorsements thereon, * * * or of any appointment or authority, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." As the petition of plaintiff clearly contains the allegation of the appointment and authority of both J. Pratt as a general superintendent of construction, and Fallahay as foreman of the bridge gang of the defendant construction company, and as the denials of such allega-

tions of appointment and authority are not verified, we are clearly of the opinion that they are taken as true under said statute. Had the court below by said instruction gone so far as to say that under said above quoted section of our statute the allegations that plaintiff was employed by the defendant, amounted to an allegation of appointment or authority, and was therefore taken as true, the denial of it not being verified, we would be inclined to dissent therefrom, but as the answer of defendant also contains the allegation that if the plaintiff was injured it was due to one of the risks assumed by him in his contract of employment with this defendant, we think it was a clear admission that there was a contract of employment between the plaintiff and defendant construction company at the time of the injury, and under the pleadings as made up, and the admissions contained in defendant's answer, we think the court was amply justified in giving the instruction complained of.

This brings us to the consideration of the vital question in the case, and the one that finally determines the real rights of the parties to this action, on its merits. That the bridge was repaired by the defendant construction company under the supervision and direction of J. Pratt, general superintendent of construction, and Fallahay, foreman of the bridge gang, if not admitted, has been fully established by the evidence in the case, and is not now before us. It is the contention of the defendant construction company that J. Pratt, general superintendent of construction, and Fallahay, foreman of the bridge gang, and the plaintiff, Wm. N. Wilson, as locomotive fireman, were all fellow servants in the general employment of building a railroad, and incidentally in repairing this bridge, and being fellow servants, the master cannot be held liable for any injury plaintiff Wilson may have sustained by reason of the carelessness and negligence of his co-employees and fellow servants in this general work. On the other hand, it is contended by plaintiff that it is the positive duty of the master to use reasonable care in providing safe tools, machinery and appliances to work with; a safe place to work in, and safe materials and structures to work on, and that a bridge such as the one falling in this case, forms a part of the working place of locomotive firemen, and being such, it is the duty of the master to keep it in safe repair for the servant's use, and that the rule that the master is not liable for an injury which is the result
305 of the carelessness and negligence of a fellow servant, has no application where the injury complained of, as in this case, is brought about by the master's negligence of a duty he owes personally to the servant, and which he cannot, under the law, delegate to an agent or subordinate without being personally liable for the carelessness and negligence of such agent or subordinate. The law that it is the master's positive duty to use reasonable care in providing safe tools, machinery, and appliances to work with, a safe place to work in and safe materials and structures to work on, is the unquestioned and well settled law of the land, and there are few if any exceptions to it. The application of this law to a given state of facts has been a matter of great difficulty, and has given rise to a

very great diversity of opinion, and the courts of the land are hopelessly divided upon the question. In all these cases the "stumbling block" has arisen over the application of the law, which is clear and well settled, to the facts of the individual cases which have arisen in the courts of the land. The master is not liable for injuries the servant may receive which are incident to the employment, and where the master has fully discharged his duty to the servant and the servant is injured by the negligence of a fellow servant, the master is not liable for such injury. It is incident to the employment, and is an assumed risk.—100 U. S., 213. But there is one important and far-reaching exception to this rule in this, that it is the positive duty of the master to use reasonable care in providing safe tools, machinery and appliances to work with, a safe place to work in, and safe materials and structures to work on.—The Reummeli-Braun Co. *v.* James W. Cahill, 14 Ok. 422. The application of this rule and the exceptions to it, has, as before stated, given rise to a very great diversity of opinion. In many instances courts of high rank stand squarely opposite to each other upon essentially the same state of facts. It is not our purpose here, nor would we be equal to the task of bringing order out of this chaos. An extended and careful examination of this case, and the law applicable thereto, has convinced us that the court below committed no error in the trial of the case, and that the judgment should stand.

It has been determined in this territory in accordance with the well settled law, that where the relation of fellow servants exist-, there can be no recovery for injury the result of the negligence or misconduct of the fellow servant, where the negligence or misconduct does not relate to a duty the master owes the servant and that he cannot delegate to an agent or subordinate.—Rummeli-Braun Co. *v.* Cahill, 14 Okla., 422. While in the above case it was, under the facts, held that the injury was caused by the negligence of a fellow servant, Mr. Justice Burwell also recognized the master's liability to the servant for the negligence of any duty which the master owes to the servant personally, and in this connection he uses this language:

"It is the positive duty of the master to use reasonable care in providing safe tools, machinery and appliances to work with; a safe place to work in, safe materials to work on, and safe fellow servants and co-employés and if the business is such as to require it, to provide safe and proper rules and regulations for the conducting of the same. Negligence in the performance of any of these positive duties will render the master liable without regard to the standing or authority of the employé through whose fault the injury is occasioned."

As before stated, it is now the fundamental and well settled law of the land that it is the duty of the master to furnish the servant safe tools, materials and structures to work with and upon; and to keep them in proper repair. He cannot delegate these duties to an agent or subordinate, so as to relieve himself from personal liability. In cases of great railroad and other corporations, the master must, of necessity, delegate the performance of such duties to subordinates, but this does not, in any sense, change the master's liability. He

remains responsible to all his servants for the negligent acts of such subordinates in regard to these imposed obligations of the master to his servant in every particular, and to the same extent as if the master himself had acted. This rule applies alike when the master is an individual or is a corporation that is capable of acting by its agents and employees only. A person entering the services of a corporation has a right to assume that it, as the master, has and will continue to discharge its obligations as such master. The master is not called upon, of course, to warrant the safety of the employee. The employee assumes all risks incident to the employment. The greater the danger of the employment, the greater the risk undertaken by the employee; but the risk of hazard so undertaken extends only so far as it is incident to the employment undertaken; but the employee does not assume and cannot be held to have assumed risks of the negligence of the master. The master, whether a corporation or an individual, is bound to exercise such care as is reasonably demanded in providing proper tools, materials, structures, and safe places to work in, and to keep road beds, tracks, and bridges for the use of its servants, in good condition and safe repair. When this has been done the master has discharged his duty, and if the servant is then injured such injury will be regarded as an incident to his employment, and if the servant is injured, such injury is clearly an assumed risk, and this is true though the injury be caused by the negligence of a fellow servant.

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As before stated it is the duty of the master to furnish a safe place for the servant to work and safe structures to work upon. The plaintiff in this case was injured by his engine falling through a defective bridge, and the question arises *to* to whether or not a bridge is a place where a locomotive fireman is called upon to work so that the duty devolves upon the master to keep the place in safe condition for his use.

"Bridges form part of a working place of train men and some other classes of railroad employees, and, generally, the rule which prescribed the duty of the employer as to the safety of the working place apply to bridges."—Sec. 1171, Elliot on Railroads; 21 Oregon, 136; 28 S. W. 711 (Tex.); 67 Fed., 524, 145 N. Y., 283.

"While it is true that a railroad company is not liable for an injury to its servant occasioned by the negligence of a fellow servant in the same line of employment, yet this rule has no application to an injury caused by defects in the machinery of the company, its tracks or bridges, which it might have known and provided against by the exercise of the highest care and diligence, it being the duty of such companies to furnish their servants safe materials and structures, and keep them in proper repair.

"Where a servant of a railway company is injured or killed in consequence of the giving way of a wooden bridge, which is defective through age and exposure to the weather, the company cannot escape liability from the fact that the bridge was constructed properly in the first place, and it employed skillful and competent subordinates to inspect and repair its bridges. Ordinary prudence in such a case

is not sufficient, but the highest degree of diligence consistent with the practical operation of the road is required.

"* * * It is further urged by appellants, if the death of Conroy (the fireman on the engine) resulted from the negligence of the superintendent of the bridge department, appellants are not liable, because deceased and the superintendent were fellow servants in the same general undertaking. It is unnecessary to comment on the many cases cited by appellants in support of the proposition that the doctrine of *respondeat superior* has no application here. The principles which ruled this case have been fully stated in N. W. R. R. Co. *v.* Sweet, Admr., 45 Ill., 201, and Ill. Cen. R. R. Co. *v.* Welch, 52 Ill., 183, in which it was held that railroad companies are bound to furnish their servants safe materials and structures, and to keep them in proper repair; and a person entering the service of a railroad company has a right to presume that, in these respects, the company has discharged its obligation. * * * This certainly is a wholesome rule as well for the public as for the companies, for it is to their interest to have their road and appliances safe and in the best condition."—Toledo, Peoria, Warsaw Ry. Co. *v.* Conroy, 68 Ill. 560.

In a recent case involving facts approaching this case, the United States Supreme Court, speaking through Chief Justice Fuller, in Union Pac. Ry. Co. *v.* O'Brien, 161 U. S., used the following language:

"A railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of the servants then company is liable for the injury sustained.

307 "The servant, on his part, undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself.

"The master is not to be held as gauranteeing or warranting absolute safety under all circumstances, but is bound to exercise the care which the exigence reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by embankments and excavations.

"* * * The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants, the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structure, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations."—161 U. S., 451; Hough *v.* Ry.

Co., 100 U. S. 213; Texas & Pac. Ry. Co. *v.* Cox, 145 U. S., 593; Gardner *v.* Mich. Cen. Ry., 150 U. S., 349, 359; U. P. Ry. *v.* Daniels, 152 U. S., 684; Chicago & N. W. R. R. *v.* Swett, 45 Ill., 197; T. & P. Ry. *v.* Conroy, 68 Ill., 560; Stoger *v.* Iron Mountain Ry., 91 Mo. 409; Paulmier & Erie R. R., 34 N. J. Law, 151; Snow *v.* Housatonic R. R. Co., 8 Allen, 441; Huddleston *v.* Lowell Machine Shops, 106 Mass. 282; Smith *v.* Harlem R. R. Co., 19 N. Y. 127; Patterson *v.* Connellsville R. R. Co., 76 Penn. St. 389.

"The breaking of a railroad trestle by a flood and the drift carried thereby renders the railway company liable to an employee injured thereby on the ground of negligence, if the character of the flood and drift is such as might reasonably have been anticipated."—Terre Haute and Indianapolis Ry. Co. *v.* Fowler, Admr. (Ind.), 48 L. R. A., 531.

It is needless to further multiply citation.

The contention is also made by the plaintiff in error that defendant in error, Wm. N. Wilson, was guilty of contributory negligence that clearly bars his right to recover in this case, because he recklessly ventures upon the bridge in question, knowing of its defective condition. We cannot endorse this view. When the engine was first cut off from the train and run out onto the bridge, it was discovered that the bridge was yielding under the weight of the engine, and the engineer reversed and ran his engine back off the bridge. Then Fallahay, the foreman of the bridge gang, J. Pratt, the superintendent of construction, with a force of men proceeded to repair the bridge by building, as we have before stated, what is known in bridge construction as a "false span," and when this was completed the engineer was assured that the bridge was safe for use, and he was advised and directed to go upon it with his engine; and of this fact the fireman Wilson was also informed, and he took his place beside the engineer and went with him onto the defective bridge. Neither the engineer nor the fireman were bridge builders, and they had no special knowledge of such department. They were advised by the foreman of the bridge gang and by the superintendent of construction that they had properly and safely repaired the bridge, and upon that assurance they went onto it with their engine. Under these circumstances the question of contributory negligence became and was a pure question of fact for the jury, and having been submitted to the jury under proper instructions we think the finding against the construction company is conclusive upon this question.—65 Kan., 857; 100 U. S., 213; 69 Kan., 738; 161 U. S., 451; 48 L. R. A., 531, and cases there cited.

It is also contended by the plaintiff in error that the injury sustained by defendant in error, Wilson, was an incident to the hazardous employment he had undertaken, and therefore clearly an assumed risk, for which he has no remedy under the law. As before stated, the employee assumes all risks incident to the employ-
308 ment, but the risks or hazards so undertaken extend only so far as they are incident to the employment. The employee does not assume and cannot be held to have assumed risks of the negligence of the master. This action was begun and has been prose-

cuted upon the claim of the negligence of the construction company in the premises, and plaintiff has recovered upon that theory. The question of assumed risks, under all the facts in the case, like the question of contributory negligence, was properly submitted to the jury, and has been determined against the plaintiff in error, and we cannot say as a matter of law that the finding of the jury is erroneous, and therefore it should stand.—65 Kan., 857; 69 Kan., 783, and cases cited.

After a careful consideration of the case, we are clear that a railroad bridge such as the one falling in this case is a place or structure where a locomotive fireman is called upon to work in the ordinary discharge of his duty, and therefore it was the duty of the master to so construct or reconstruct the same as that it would at all times, be safe for the use of its servant, and to keep the same in repair. The bridge in question was clearly defective, and the construction company cannot be heard to say, under the evidence and law, that it is not liable. The construction company owned its servant, Wm. N. Wilson, a personal duty, under the law, of keeping this bridge in reasonably safe repair for Wilson's use. It failed in this. Its liability has been clearly shown, and the judgment of the court below is affirmed; all the justices concurring, except Burwell, J., who presided in the court below, not sitting.

309 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 308 pages, numbered from 1 to 308, inclusive, are a full, true and complete transcript of the record and all proceedings in said Supreme Court in the case of McCabe & Steen Construction Company, Plaintiff in error, *vs.* William N. Wilson, Defendant in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 2nd day of November, A. D. 1906.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,460. Oklahoma Territory supreme court. Term No. 155. McCabe & Steen Construction Company, plaintiff in error, *vs.* William N. Wilson. Filed November 19th, 1906. File No. 20,460.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

McCABE & STEEN CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM N. WILSON,
Defendant in Error.

No. 155.

In Error to the Supreme Court of the Territory of Oklahoma.

STATEMENT.

On June 9, 1902, William N. Wilson, defendant in error, was injured by the falling of a railway bridge across the Canadian river whereby he received serious and permanent injuries. The bridge was a portion of a new line of railroad which was being constructed by the Oklahoma City & Western Railroad Company from Oklahoma City to Quanah, Texas. Wilson at the time was firing the engine of a construction train. The railroad had been constructed and the steel laid to a point south or west of the Canadian river. On the morning

of June 9, 1902, the construction train, with Tuck Waters as engineer and Wilson as fireman, started out of Oklahoma City bearing cars of material, and headed for its day's labor upon the line of road. When the train arrived at Canadian river it stopped; the river was very high. A section gang or bridge gang were at the bridge with a man named Fallahay as foreman. A man named Pratt, who is alleged to have been the superintendent of defendant, went out on the train. The engine was cut off from the rest of the train and started out on the bridge for the purpose of drawing in a loaded car which Fallahay had previously caused to be pushed out over the bridge for the purpose of testing the strength of the bridge. The bridge had withstood this test, but when the locomotive started upon the bridge for the purpose of pulling back the loaded flat car some bents of the bridge gave way, but not sufficiently to cause the engine to fall. The engine then backed off of the bridge. Tuck Waters, the engineer, and Wilson, the fireman, were both on the engine at the time. All parties then present engaged in repairing the bridge. The engine was attached by a rope to the dislocated bents, and by backing drew the bents up in place, where they were fastened and secured by the bridge gang under the direction of Fallahay. After this was done Pratt and Fallahay gave Waters, the engineer, their opinion that the bridge was safe, and instructed Waters to run his engine on the bridge and attach it to the car that was originally started after. This was done. The engine was run out to where the car was, fastened to it and backed off of the bridge, being attached again to the construction train. While this was being done the bridge was closely watched by Fallahay and Pratt, and gave no evidence of yielding. Upon a given signal by the conductor in charge of the train, and also by Pratt,

Waters started up his engine, with Wilson in his place as fireman, and proceeded to cross the bridge. The loaded flat car was being pushed ahead of the engine and the balance of the train was being pulled behind it. When the engine reached a point over the bents which had previously given way they gave way a second time and the engine sunk into the river, which was greatly swollen. The fireman, Wilson, was caught in the falling engine and had his leg broken in two places and was washed down the stream, but succeeded in saving his life. Wilson brought suit in the District Court of Oklahoma County against the plaintiff in error to recover damages for the injuries received by him, and made the following allegations which have affected directly the result of the suit:

(1) That defendant was the sub-contractor engaged in constructing a portion of said railroad extending from Oklahoma City to Quanah, Texas.

(2) That plaintiff was employed by said defendant through one, J. Pratt, the general superintendent of construction of defendant, as locomotive fireman on one of defendant's engines used by it in hauling cars containing material for the building of a portion of said railroad.

(3) That plaintiff while so engaged was seriously and permanently injured through the negligence and default of defendant in the following manner: That being engaged as aforesaid, upon the arrival of his engine and train at Canadian river they found a bridge gang in the employ of said defendant consisting of "Mike Fallahay, foreman, and about twenty men engaged in repairing the railroad bridge which had previously been constructed by said defendant" over the Canadian river; that on the same train was J. Pratt,

the general superintendent of construction; whereupon by direction of Pratt and said foreman of said bridge gang the train was stopped in order that said bridge might be repaired. That at the expiration of an hour and a half the foreman of the bridge gang and the superintendent of construction advised the conductor, engineer and plaintiff that they could safely proceed to cross the bridge, whereupon they started across the bridge, "and when said engine had reached a point immediately over the main current of the water in said stream the said bridge, by reason of the negligence and unskillful manner in which same was constructed, and the negligent and unskillful manner in which the supports thereof were placed by said defendant, and because of the failure of said defendant to place proper and sufficient supports and braces under and against said bridge, gave way and the said engine fell through said bridge and into the main channel of the said stream, whereby this plaintiff received the said injuries hereinbefore referred to which are the following to-wit" (R. pp. 20-21).

The defendant answered by general denial, and that plaintiff's injury was (1) due to the act and negligence of a fellow servant (2) and was a risk assumed by the plaintiff in his contract of employment with defendant, and (3) was due in whole or in part to the negligence of the plaintiff himself. (R. p. 24.) The trial resulted in a verdict for plaintiff for five thousand and five hundred ($5500) dollars. A motion for new trial was overruled; the case was taken to the Supreme Court for the Territory of Oklahoma and there affirmed (R. pp. 206-7-8-9-10-11-12-13-14), from whence it is brought here.

The propositions that plaintiff in error will present to this honorable court are as follows:

I.

When plaintiff closed his evidence the defendant presented a demurrer to the evidence which was overruled and defendant excepted. (R. pp. 69 and 174.) The plaintiff had offered the testimony contained in the record between pages 25 and 69 inclusive. The only witnesses that testified as to the liability of the defendant for the injuries received were Tuck Waters, the engineer, and the plaintiff himself. Tuck Waters testified that Mr. Pratt was the superintendent of construction, and that Fallahay was foreman of the bridge gang; (R. pp. 26-27) that he and Wilson were operating a construction train; that the road was not operated for the carrying of passengers and was not an equipped or completed road. That they were assisting in the construction of the road in hauling material and in one way and another; that the train which they were hauling on this day was carrying ties, rails and such stuff as that; that McCabe & Steen were engaged at that time in building depots and bridges, water tanks and in laying track. (R. pp. 46-47.) That the day before the accident occurred he and Wilson brought a train over that bridge from the front of the work to Oklahoma City without accident; that a bulletin had been posted to come to a full stop at the Canadian river bridge and receive a signal before crossing, or see that everything was safe and secure before crossing. That a heavy rain had occurred the night before the accident. When they arrived at the bridge they found a loaded flat car out on the bridge, and upon receiving a signal they started with the engine on the bridge to attach to this loaded flat car. (R. pp. 26-27 and pp. 52-53.) They had just started for the car and the bridge started to

fall and they backed off before it fell. The timbers gave way.

Q. And what was done with it?

A. Why we taken a rope and fixed it to the bridge and to the engine—the other end—and pulled it back in place.

Q. What do you mean by "we?"

A. Well, the engineer and fireman, and the foreman and the men; they put a couple of ropes on the piles and pulled it back.

Q. Did you work on it together?

A. Yes, sir.

Q. And then what did you do, after you pulled it back in place?

A. We waited there quite a while and then we went over after the car.

Q. Who went over after it?

A. Myself and the conductor, and fireman and Mr. Fallahay went along in the engine.

Q. And you hitched on to the car?

A. Yes, sir.

Q. What did you do with it?

A. We pulled it back over the river with us.

Q. What did you do then?

A. Coupled on to the train.

Q. And then what did you do?

A. Coupled on to the train and got the order, and the conductor says to me: "Pull down and we will unload our freight, and we will be ready to go."

Q. And then you started over?

A. Yes, sir.

Q. And fell in the river?

A. Yes, sir.

Q. Is that all that occurred there?

A. I got the signal from Mr. Pratt and Mr. Fallahay also told me. We walked out on the bridge and he told me it was safe—it was all right; I didn't want to take any chances on my life.

Q. That was just before you started?

A. It was just before we started after the car, after we fixed the bridge up, we came back and then started over, and fell in. (R. p. 53.)

Q. What condition was the water in?

A. It was up quite a bit; the river was rising.

Q. It was very high, wasn't it?

A. Yes, sir; it was very high; it had been. (R. p. 54.)

Q. Now then, when you got down to this bridge what did you do with reference to crossing it?

A. We always had an order to go down to the bridge and stop and see if everything was safe and then cross over, and that's what we did.

Q. Before you went on to the bridge did you get the signal?

A. Yes, sir; and then went over and got the car.

Then he testified that he started on the bridge, the bridge sunk and he backed off and took a cable, pulled the piles back and made it secure. That Pratt and Fallahay reported the bridge all right. That he went on to the bridge the second time and fastened on to the car in the middle of the bridge, waited for the signal, and then pulled the car back to where the train was on the north side of the river; hitched on to the train, the conductor gave the command to go ahead, and when they got out on the bridge it sank. That he walked on

the bridge with Pratt and Fallahay and talked about it, and asked them if they thought the bridge was safe and they said it was. That he then went back on the engine and told Wilson what Pratt and Fallahay had said about it. (R. pp. 26-27-28.)

Wilson's testimony was to the same effect. (R. pp. 57-59 inc.)

Waters also testified that before going over the bridge with the engine and train he told Wilson that if he was afraid he could get off the engine and walk over—follow the train over—and could catch the hind end of the train, but that Wilson did not avail himself of it but stayed in the engine. (R. pp. 55-56.)

This was all the testimony plaintiff offered on the question of negligence of the defendant, and defendant contended that it disclosed negligence on the part of plaintiff and assumption by him of the risks of crossing.

II.

Defendant attempted to show under the general denial that the corporation which was sued, McCabe & Steen Construction Company, was not in existence at the time of the injury to Mr. Wilson—June 9, 1902; that the defendant had no contract to construct the railroad or the bridge and had not constructed either and had not repaired either. That the plaintiff was not in its employ; that Pratt was not its superintendent of construction or in its employ and that Fallahay was not in its employ. That it was not operating the train upon which plaintiff and Tuck Waters were working, and in support of these contentions proved by Mike Fallahay that on June 9, 1902, he was employed by McCabe & Steen, a partnership, as foreman of a bridge gang. (R. p. 128.) That Mr. Pratt was employed also by McCabe & Steen; that he was employed in handling trains (R. p.

138). That McCabe & Steen were building bridges, laying track, etc. (R. p. 139). Defendant proved by V. E. Steen that he was an officer of the McCabe & Steen Construction Company; that the plaintiff Wilson never worked for that company at any time and never was in its employ. That Wilson worked for McCabe & Steen. (R. p. 153.) That McCabe & Steen assigned the contract to do the work on the railroad to McCabe & Steen Construction Company on the 23rd day of July, 1902, but that prior to that time McCabe & Steen Construction Co. had nothing to do with it. (R. p. 154.) The defendant offered a contract in evidence tending to show that at the time of the injury McCabe & Steen, a partnership, had charge of the work, and that McCabe & Steen Construction Company were not in existence, and that the plaintiff at that time was not in the employ of the defendant. Upon objection by the plaintiff the court excluded the contract and withdrew from the consideration of the jury the testimony of the witness Steen to the effect that the plainiff Wilson was never in the employ of the defendant, and the defendant excepted. (R. pp. 154-155.) The court then admitted the instrument for the purpose of showing that McCabe & Steen Construction Company did not have the work in charge and were not performing the work at that time; were not building either the bridge or the road from Oklahoma City to Quanah. (R. p. 156.)

Mr. Steen further testified that on June 9, 1902, the defendant was not performing any contract for the construction of the railroad from Oklahoma City to Quanah, Texas, when an objection was made to the testimony and the objection sustained, and the testimony stricken out and the defendant excepted. (R. p. 156.) The court then permitted the witness to testify that the defendant was not constructing the road or the bridge

and had no contract for its construction. The question was asked the witness Steen as to whether or not Pratt was in the employ of the defendant at that time. The court sustained an objection to this testimony and the defendant excepted. The question was asked Steen then if Mr. Fallahay was in the employ of the defendant at that time, to which an objection was sustained and the defendant excepted. (R. pp. 157-158.) The witness then stated that McCabe & Steen, a partnership, had the contract for the construction of the road from Oklahoma City to Quanah; that under that contract the partnership had the track laying, pile driving, bridging, etc.; that Martin & McCabe were sub-contractors and did the bridging; that Jim Pratt had charge of the moving of the trains and had charge of the trainmen, but was not any general superintendent; that Pratt had no authority with reference to bridge building but that Fallahay had. That Brown & Shaw had charge of the depot building and that Gray had charge of the tank building. That they were all independent foremen, and none of them under Pratt or under each other. (R. pp. 159-160.) On this branch of the case the court, in paragraph No. 10, charged the jury: "The jury are instructed that the uncontradicted evidence having shown that the defendant company did not originally build and did not make the repairs upon the bridge in question, you can not hold it responsible for any faults in construction. Therefore, if you believe from the evidence that the proximate cause of plaintiff's injury was faulty construction of the bridge you will find for defendant, unless you further find that defendant knew the construction of said bridge, in which event it would be chargeable the same as though it had caused it to be built. And in this connection you are further instructed that the defendant is estopped from claiming

that it was not operating the train in question, or that Fallahay or Pratt or plaintiff was not in its employ or that it was not in existence at the time of the alleged injury." (R. pp. 185-186.)

Plaintiff in error's proposition under this charge is that the charge above quoted makes a different case from that made in the petition. The petition bases the right of recovery upon the negligent and unskillful manner in which the bridge was constructed, and the negligent and unskillful manner in which the supports were placed by defendant and because of the failure of said defendant to place sufficient supports and braces under and against said bridge the bridge gave way and the engine fell through and the injury resulted to plaintiff; whereas, the charge above quoted gives plaintiff the right to recover against the defendant if defendant is innocent of all the charges made against it by the plaintiff in the petition, but had knowledge of the faulty construction, a proposition not urged against plaintiff in error in the petition at all. Plaintiff in error further contends that there was nothing in the petition or answer to estop it from claiming that it was not operating the train in question, or that Fallahay or Pratt or plaintiff was not in its employ.

III.

Defendant further contended that Pratt, Fallahay, Tuck Waters and the plaintiff were fellow servants engaged in the common undertaking of constructing the road and the bridge. The testimony of Tuck Waters to the effect that Pratt was superintendent of the bridging was shown to be hearsay. (R. p. 50.) The same was true of Wilson's testimony to that effect. The testimony of Fallahay is given above. F. W. McCabe, a member of the firm of McCabe & Steen, testified that

he had charge of the construction of the road personally; that he was superintending the work; that he hired all the foremen and looked after practically all the work; instructed them where to work and what he wanted them to do; that he had no general employee or superintendent or officer under him; that Mike Fallahay was the foreman of the bridge building; that Mr. Pratt had nothing to do with bridge building and had no charge of it whatever. That Mr. Pratt had no charge of the force building the depots, or of the water tanks or of the painting. Mr. Pratt's sole duties was the train service; he hired the train men, directed the trains and hauled the material to the front. That he hauled material to the bridges, depots, water tanks, cattle guards, stock pens, etc. (R. p. 164.) That Pratt was in charge of the hauling and distribution of the material, and that was all he had to do. (R. p. 163.)

ASSIGNMENT OF ERRORS.

(R. pp. 3-15.)

1st Assignment of Error. (5th.)

The court erred in over-ruling the demurrer offered by plaintiff in error to the evidence produced by the defendant in error.

2nd Assignment of Error. (26th.)

The court erred in giving to the jury the instruction contained in paragraph 4 of the charge, which is as follows, viz:

You are instructed that if the defendant, in repairing this bridge, performed the work in the usual and customary manner in which work of this character, under similar circumstances, is constructed, and used that degree of care in the erection and construction of such structure that a person of ordinary prudence engaged in such work would have used under like circumstances, then the defendant would be guilty of no negligence in the construction and repair of such bridge, and in such case you will find for defendant, unless you further find that after a portion of the bridge was taken out and such repairs made the defendant, in the light of all the facts within its knowledge, ought to have known that at the time of the alleged injury the bridge was unsafe, or was in possession of such knowledge, facts and circumstances as would have caused an ordinarily prudent person engaged in such business to investigate, and if investigation had been made it would have led to a knowledge that the bridge was unsafe.

3rd Assignment of Error. (30th.)

The court erred in giving to the jury the instruction contained in paragraph 10 of the charge, which is as follows, viz.:

The jury are instructed that the uncontradicted evidence having shown that the defendant company did not originally build and did not make the repairs upon the bridge in question, you cannot hold it responsible for any faults in construction. Therefore, if you believe from the evidence that the proximate cause of plaintiff's injury was faulty construction of the bridge you will find for defendant unless you further find that defendant knew the construction of said bridge in which event it would be chargeable the same as though it had caused it to be built.

And in this connection you are further instructed that the defendant is estopped from claiming that it was not operating the train in question or that Fallahay or Pratt or plaintiff was not in its employ or that it was not in existence at the time of the alleged injury.

4th Assignment of Error. (31st.)

The court erred in giving to the jury the instruction contained in paragraph 11 of the charge, which is as follows, viz.:

If you find that the defendant had issued an order to all train men to stop at the bridge and see that everything was safe before crossing, this order would not require each person on the train to get off of the train and make a personal inspection of the bridge. If the general superintendent of the defendant was present and advised the train crew that the bridge was safe and signaled the train men to cross over, the order in question was sufficiently complied with.

5th Assignment of Error. (36th.)

The court erred in submitting said cause to the jury and in not entering judgment for plaintiff in error because the undisputed evidence showed that defendant in error was engaged in the construction of the road bed and bridge in question and was a fellow servant with Pratt, Fallahay and Tuck Waters.

6th Assignment of Error. (32d.)

The court erred in submitting said cause to the jury and in not entering judgment for plaintiff in error because there was no evidence of negligence on the part of plaintiff in error.

7th Assignment of Error. (33d.)

The court erred in submitting said cause to the jury and in not entering judgment for plaintiff in error because the uncontradicted testimony showed that defendant in error could have avoided injury by the exercise of ordinary care and prudence.

8th Assignment of Error. (41st.)

The supreme court erred in holding that the general denial was not sufficient to put in issue the capacity under which Pratt and Fallahay were in the service of plaintiff in error.

9th Assignment of Error. (42d.)

The supreme court erred in holding that the general denial was not sufficient to put in issue the question as employment of a servant by plaintiff in error and the capacity under which he was employed.

10th Assignment of Error. (44th.)

The supreme court erred in holding that the general

denial was not sufficient to put in issue the question as to whether or not plaintiff in error was a master or employer of defendant in error at the time of the happening of the events complained of.

11th Assignment of Error. (45th.)

The supreme court erred in holding that the general denial was not sufficient to put in issue the question as to whether or not the plaintiff in error was a master or employer of Pratt and Fallahay at the time of the happening of the events complained of.

12th Assignment of Error. (47th.)

The supreme court erred in holding that the rule of law with reference to the master's responsibility to furnish a safe place for the servant to work applies alike to a construction company engaged in the construction of a road bed and erection of bridges and to a railroad company with completed road bed and bridges engaged in the operation of trains for traffic.

13th Assignment of Error. (49th.)

The supreme court erred in holding that Pratt and Fallahay were not fellow servants of defendant in error.

14th Assignment of Error. (10th.)

The court erred in refusing to give to the jury instructions of the plaintiff in error as follows, viz.:

To bring in a verdict in favor of the defendant.

15th Assignment of Error. (34th.)

The court erred in submitting said cause to the jury and in not entering judgment for plaintiff in error because the uncontradicted testimony showed that defendant in error voluntarily and needlessly subjected

himself to the risk from which the injury resulted, with full knowledge of its existence.

16th Assignment of Error. (38th.)

The trial court erred in over-ruling the motion presented therein for a new trial of said cause.

17th Assignment of Error. (39th.)

The supreme court erred in affirming the judgment of the trial court and in ordering the same to be executed.

ARGUMENT.

I.

The first assignment of error brings up for review the refusal of the court to sustain the demurrer offered by defendant to plaintiff's evidence. This evidence is found under division one of the statement, and in support of its contention, plaintiff in error makes the following propositions thereunder:

FIRST. That the testimony offered did not show any negligence on the part of the defendant. The bridge was not shown to have been faultily constructed. The same train crew had crossed it on their return from work the evening before. The water had risen rapidly on the intervening night. The bridge was not a permanent structure, but was what was termed a "temporary structure." Tests usually considered sufficient were applied to it the morning of the accident. Before plaintiff arrived with the train a loaded flat car had been pushed out over the bridge in order to test it and it had withstood the test. After the arrival of plaintiff's train at the bridge, the engine was detached and sent out over the bridge with the intention of attaching it to the loaded flat car which was standing on the bridge, and under the engine the bridge sank, and the engine was backed off in safety. The dislocated bents were then put in place and the bridge repaired and the engine again sent over the bridge after the flat car, and on this occasion the bridge supported the engine sufficiently. The engine fastened to the flat car and came back over the place that had first given way, and the bridge supported both the engine and the flat car. The

engine was then fastened to the train and again started across the bridge, pushing the flat car ahead of it and drawing the train behind. On this occasion the bridge sank and the injury resulted. During all of this time everybody present was observing and testing and passing judgment on the water and the bridge. Unless the mere fact that the bridge fell is to be accepted as evidence of negligence, then it is hard to perceive where the negligence of the master was shown.

Patton vs. T. & R. Ry. Co., 179 U. S., 658;
Daniel vs. Met. R. Co., L. R. 3 C. P., 216;
In re Michigan Steam Ship Co., 133 Fed Rep., 577;
Baldwin vs. St. Louis R. Co., 68 Iowa, 37;
Chesapeake &c., R. Co. vs. Thierman, 15 Ky. L. Rep., 655;
Fass vs. Baker, 62 N. H., 247;
Knight vs. Cooper, 36 W. Va., 232;
Chicago, etc., R. Co. vs. Kellogg, 55 Neb., 748.

SECOND. If negligence existed, it existed equally on the part of the plaintiff as on the part of the master. The plaintiff was present when the first accident happened; he saw the bents give way; was on the engine at the time; he saw the bridge repaired; he assisted in the repair; he took part in the tests of running the engine over the bridge and back again; he saw the turbid stream; he saw that Fallahay and his gang were there protecting the bridge from driftwood. He was given the opportunity by the engineer, Tuck Waters, of going back and getting on the tail end of the train so as not to run the risk of the bridge going down with the heavy locomotive. If he had done this he would have avoided all danger, but he voluntarily remained in the locomotive and voluntarily took the risk of going

over the bridge which he had seen sink and which he had seen repaired.

Fac. & Tea. Ins. Co. vs. Western, 11 L. R. A., 361;
Cowhill vs. Roberts, 71 Hun (N. Y.), 127;
Hayden vs. Smithville Mfg. Co., 29 Conn.;
Hunt vs. Kane, 100 Fed Rep., 256;
Larkins vs. Wash. Mitts Co., 45 N. Y. App. Div. 6;
Louisville R. Co. vs. Hall, 87 Ala., 708.
See also 104 Ala., 508; 50 Mo., 302; 71 Mo., 164; 92 Pa. St., 276.

THIRD. That the plaintiff assumed whatever risk was attendant upon crossing the bridge. He was cognizant of all the facts and circumstances; he witnessed them all; there were no hidden defects shown to have been known to the master that were not known to him. He had a perfectly safe way offered him of crossing the river and declined to avail himself of it, and voluntarily took the dangerous way when he would have sacrificed nothing by taking the safe way. He also had ample time for reflection and observation. It will not do to say that he was influenced by the advise of Pratt and Fallahay. He was a fellow-servant with Pratt and with Fallahay. He was engaged in running a construction train for the hauling and distribution of material. The very train had aboard bridge material which had to be put off at this place. This was his regular employment; beside, in addition to which, after the bents in the bridge sunk the first time he actively co-operated with all the others in straightening up the bents and repairing the bridge. The engine was hitched to the bents by a rope and backed until the bents were brought into place. The plaintiff co-

operated with all the others in repairing the injured structure. Neither is it sound to say that he was excusable because of the fact that the master had to furnish a safe place for him to work, and the bridge was such a place, for the reason that he was actually employed in the construction and repair of the place itself, and all of this was shown by plaintiff's own evidence.

Enright vs. Oliver, 101 Am. St. Rp., 710;
Anderson vs. Winston, 31 Fed. Rep., 528;
Raul vs. E. T. R. Co., 85 Ga., 197;
Writ vs. G. L. Co., 91 Wis., 496;
Wright vs. So. R. Co., 80 Fed., 260;
Showalter vs. Fairbanks, 88 Wis., 376;
Allen vs. Gilman, 127 Fed. Rep., 609;
Tesh vs. M. E. Ry., 108 Wis., 583;
See also 51 Md., 47; 50 Mo., 302; 21 S. C., 541; 61 Vt., 348.

We therefore respectfully submit that the demurrer to plaintiff's evidence should have been sustained for each of the reasons cited, viz.: (1) That it showed no negligence on the part of the defendant; (2) that if there was negligence on the part of the defendant there was equal negligence on the part of the plaintiff which contributed proximately to his injuries, and (3) that plaintiff assumed the risk of crossing the bridge.

To like effect are the propositions arising under the 6th, 7th and 15th Assignment of Error, and will not further be adverted to.

II.

Plaintiff alleged that the defendant corporation injured the plaintiff; that Pratt was a superintendent of construction for defendant corporation, and that Mike

Fallahay was foreman of the bridge gang; that plaintiff was a fireman engaged in running defendant's construction train; that defendant constructed and repaired the bridge in question negligently, so that it fell down and injured the plaintiff. Defendant answered by general denial, by an allegation of contributory negligence, and of assumed risk on the part of plaintiff. Defendant was permitted to prove that it was not in existence at the time of the accident; that it had no contract for the building of the railroad mentioned, nor the bridge; that the plaintiff was never in its employ, nor were Pratt and Fallahay in its employ at the time; that it did not build the bridge or repair it and was not operating the train or the engine upon which plaintiff was injured. Whereupon the court gave the instruction to the jury set forth in the 3rd Assignment of Error, wherein he tells them that the uncontradicted evidence showed that defendant company did not originally build and did not make the repairs upon the bridge in question, and that they can not hold the defendant company responsible for any faults in construction. That if they believed from the evidence that the cause of plaintiff's injury was faulty construction of the bridge, to find for defendant, unless they further find that defendant knew the construction of the bridge, in which event it will be chargeable as though it had caused it to be built. And further charged them in the same connection that the defendant is estopped from claiming that it was not operating the train in question, and estopped from claiming that either Fallahay or Pratt or the plaintiff was in its employ, and estopped from claiming that it was not in existence at the time of the alleged injury. See paragraph two of statement. The jury in their answers to questions Nos. 1, 5, 6 and 9 (R. pp. 188-9), find that the bridge was constructed faultily and re-

paired faultily. The allegation upon which plaintiff seeks to recover in the petition (R. p. 21), is: "The said bridge, by reason of the negligent and unskillful manner in which same was constructed, and the negligent and unskillful manner in which the supports thereof were placed by said defendant, and because of the failure of said defendant to place proper and sufficient supports and braces under and against said bridge, gave way and the said engine fell through said bridge and into the main channel of the said stream, whereby this plaintiff received the said injuries," etc. Under this 3rd assignment we submit the following propositions:

FIRST. The plaintiff having laid the negligence attributable to defendant to the unskillful and negligent manner in which the bridge was constructed and repaired by defendant, and the court having told the jury in the charge quoted that the uncontradicted evidence showed that the defendant company did not originally build and did not make the repairs upon the bridge, the verdict should have been for the defendant.

Ruffington vs. A. & P. R. R., 64 Mo. 246;
Waldhier vs. Hannibal & St. Joe Ry., 71 Mo. 516;
C., C. & I. C. Ry. vs. Troesch, 68 Ill. 545;
Beck vs. Ferrara, 19 Mo. 30;
C. & E. Ill. R. R. Co. vs. Jennings, 54 L. R. A. 827.

SECOND. The allegation of negligence having been the negligent and unskillful manner in which the bridge was constructed and repaired by defendant, and that being the only allegation of negligence, (R. p. 21) the charge given by the court to the effect that although defendant did not construct or repair the bridge that if the construction was faulty and de-

fendant **knew of it** it would be chargeable the same as though it had built the bridge, is not supported by the allegation contained in the petition in which no allegation of knowledge is made.

Patton vs. T. & R. Ry. Co., 179 U. S. 658;
C., C. & I. Ry. vs. Troesch, 68 Ill. 545 and cases cited *supra;*
22 Ency. of Pleading & Practice, page 557;
Price vs. St. L. & C. Ry. Co., 72 Mo. 414.

THIRD. The allegation that plaintiff was employed by defendant company was not denied under oath, there was only a general unverified denial, and in a special answer the allegation occurred that if the plaintiff was injured, which was denied, the same was due to one of the risks assumed by the plaintiff in his contract of employment with the defendant and for which the defendant was in no way liable. (R. p. 24.) Section 3986 of the Code provides: "In all actions allegations of the execution of written instruments and the endorsements thereon * * * of any appointment or authority shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

We respectfully submit that the above did not justify the trial court in charging the jury in said paragraph 10, "that the defendant is estopped from claiming that it was not operating the train in question."

Further, the court was not justified in charging the jury "that the defendant is estopped from claiming that Fallahay or Pratt or plaintiff was in its employ."

To the same effect are the 8th, 9th and 11th assignments of error, and will not be further adverted to here.

III.

Under the 2nd assignment of error we set forth paragraph 4 of the judge's charge, wherein the judge tells the jury that if the defendant performed the work of repairing the bridge in the usual and customary manner, and used such degree of care in the erection and construction of the bridge as a person of ordinary prudence engaged in such work would have used under like circumstances, to find for the defendant; whereas, in paragraph 10 of the charge, set forth in the 3rd assignment of error, the jury are told that the uncontradicted evidence shows that the defendant company did not either build or repair the bridge in question, and the same conflict is shown throughout the whole charge. (R. p. 182.)

We respectfully submit that this irreconcilable conflict in the charges was misleading to the jury and utterly failed to present to them in an intelligible manner the issues arising upon the pleading and evidence.

Snyder vs. Wheeling Electrical Co., 39 L. R. A., p. 501.

IV.

The 5th assignment of error raises the proposition that the plaintiff Wilson was engaged in the construction of the road bed and bridge equally with Pratt, Fallahay and Tuck Waters, and was a fellow servant of all three. The 13th assignment of error presents the same proposition and likewise the 12th, except that in the 12th the proposition is raised that the bridge under the circumstances of this case was not a "place" required to be furnished by the master for his servants to work. The facts of the case are fully presented in the

statement. Under these assignments we make the following propositions:

FIRST. Apart from a consideration of the work that they were actually engaged in at the time, Pratt, Fallahay, Waters and the plaintiff were fellow servants.

Ry. Co. vs. Baugh, 149 U. S. 380;
Peterson vs. Ry. Co., 162 U. S. 347;
Ry. Co. vs. Hambly, 154 U. S. 349.

SECOND. That neither the construction nor the repairing of the bridge was any more the master's work than the construction or repair of any other portion of the road, but was a part of the common undertaking of all persons there engaged, and that the rule requiring the master to furnish his servants with a reasonably safe place in which to work does not apply where the place of work is one that the servants themselves undertake to erect and provided as one of the duties and undertakings of their common employment.

Thayer vs. Smoky Hollow Coal Co., 121 Iowa 121;
Kansas Ct. So. Ry. Co. vs. Billingslea, 116 Fed. Rep. 335;
Kansas, etc., Coal Co. vs. Chandler, 71 Ark. 518;
Kellaw vs. Tram Co., 18 Colo. App. 475;
Greely vs. Foster, 32 Colo. 292;
Hoelter vs. McDonald, 82 N. Y. App. Div. 423;
Culver vs. S. H. Ry. Co., 138 Mich. 443;
Baltimore R. Co. vs. Hunsucker, 33 Ind. App. 27;
Fournier vs. Pike, 128 Fed. Rep. 991.

V.

Plaintiff in error requested the court to instruct the jury to bring in a verdict in favor of the defendant, (R.

p. 176) which was refused and defendant excepted, and assigns error under its 14th specification.

Plaintiff in error presented a motion for a new trial in which all the questions now presented were raised, (R. p. 190) which was overruled by the court and defendant excepted, and assigns error as its 16th specification. And as its 17th specification assigns that the Supreme Court of the Territory of Oklahoma committed error in affirming the judgment of the trial court and in ordering the same to be executed.

We respectfully submit that for the errors committed the judgment should be reversed and the cause remanded.

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Office Supreme Court, U. S.
FILED.
MAR 3 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 155.

McCABE-STEEN CONSTRUCTION COMPANY, PLAINTIFF IN ERROR,

vs.

WM. N. WILSON, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
JOHN H. WRIGHT,
Counsel for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

The statement of facts contained in brief for plaintiff in error is as favorable to it as there is any evidence whatever tending to support, and does not take into account the well-known rule of law that, in a court of error, the facts are taken to be as favorable to the defendant in error as there is any evidence reasonably tending to support. We desire, therefore, to call attention to some of the material facts shown by the record and ignored in the argument of counsel for plaintiff in error.

On June 9, 1902, the plaintiff below, while engaged as a locomotive fireman, was seriously and permanently injured by the falling or breaking of a pile bridge over the South Canadian River, which he was attempting to cross on his engine in the performance of his duties as fireman. An

examination of the photographs set out between pages 172 and 173 of the record gives a general idea of the character of this bridge. Near the lower left-hand corner of the second photograph the court will notice the smoke-stack of the engine on which Wilson was riding sticking up out of the water as it appeared shortly after the accident. The bridge or trestle was about 1,200 feet long (R., 103). The South Canadian River is a very treacherous stream with a large amount of quicksand in it, and changes its channel frequently in time of high water (R., 76, 77, 86). In such a river bents of a pile bridge may be cut out in thirty minutes, and it is generally customary before plans for a bridge are made to make soundings for the purpose of ascertaining how far it is to rock, and it is the better method to send the piling down to the rock, particularly where the material above the rock is sand or quicksand (R., 77-79). By what is termed "jetting," piling may be put down 80 feet if necessary (R., 81, 86).

W. P. Homan was the chief engineeer in charge of the building of this railroad (R., 81). Before drawing the plans for the bridge, soundings were made under his directions for the purpose of ascertaining the character of the soil or material in the river (R., 85). The deepest soundings made showed that it was about 52 feet to solid rock, of which 40 to 44 feet was quicksand (R., 85-86). The whole weight of the structure rests upon the piles (R., 79, 84-5). Shortly before the accident a part of the bridge had been washed out, of which fact the chief engineer and plaintiff in error had knowledge (R., 87, 166). Notwithstanding the fact that the washout had demonstrated that the bridge as built was not sufficient at that point to withstand floods, it was rebuilt according to the same plans (R., 89-90, 144, 150, 170), and the man who had charge of rebuilding it would not say that he drove any piling more than eighteen feet deep (R., 143, bottom). The explanation made by the chief engineer for rebuilding the bridge ac-

cording to the plans, which had been demonstrated to be insufficient, was that, according to experience with other rivers of the same character and experience with this river by other persons at other points, the bridge should be sufficient, and that the fact that the bridge had not withstood the first flood was no reason that it would not stand when rebuilt (R., 89-90). In other words, the explanation seems to be that theoretically the bridge ought to have been sufficient, and they put it back the same way, regardless of the fact that they knew it was not in fact sufficient. In rebuilding the bridge after the washout no provision was made whatever for allowing the drift to pass through when the river was up (R., 109). The flood which washed the bridge out the first time was considerably greater than that at the time of the accident (R., 118).

One of the witnesses for plaintiff in error testified that both the first washout and the falling of the bridge at the time of the accident were caused by the river scouring and the fact that the bridge had nothing to support it (R., 102, 110-11). To properly and safely support a bridge of this character, piling should be driven deeper than 18 feet, unless bed-rock was struck at or before that depth was reached (R.,108).

On the day of the accident the plaintiff below, with the train crew, approached the bridge from the north or east side, and they first stopped and cut the engine off from the train, intending to go over the bridge and bring back a car that was loaded and shoved on it. Just as they got out onto the bridge it started to sink down and the engineer backed the engine off (R., 52, 58-59).

Mr. Fallaha, in charge of the bridge-work, was there with a gang of men working on the bridge at the time (R., 58). Mr. Pratt, the superintendent, had gone out on the engine with defendant in error and the rest of the train crew (R., 58). After the bridge had started to go down and the engineer backed off, Mr. Pratt, the superintendent,

and the bridge men went to work repairing the bridge (R., 59). After this work had continued for some time both Pratt and Fallaha reported to the trainmen that the bridge was all right—perfectly safe (R., 27, 53-54, 56); and the engineer, relying on these assurances, told plaintiff below what Messrs. Fallaha and Pratt had said (R., 59). Then they went out onto the bridge and brought back the car standing there and coupled onto the train (R., 63). Either Mr. Pratt, or Mr. Fallaha, or both, signaled the trainmen to go ahead, to which they responded and started across the river with the engine and train (R., 53, 60). Defendant in error started to fix his fire, and just as they got over the main current of the water the bridge went down and the engine and men in it were carried to the bottom (R., 60). Defendant in error was at first fastened down between the cab and the tender, but finally got loose, crawled through the cab window, with the water nearly to the top thereof, was again carried under the water by flying timbers, but finally arose to the surface and was rescued with his leg broken and with various other injuries (R., 60-61). Whereupon he was taken to St. Anthony's Hospital, at Oklahoma City, where he remained for two months and two days (R., 62), since which time and up to the date of the trial he had been able to do very little work (R., 64). Prior to this accident he was in robust health, having never been sick since he was old enough to remember (R., 62-63).

Mr. Fallaha, the bridge foreman, admits that just before the accident he told Mr. Pratt, who he understood was the man in charge of the train, that the bridge was all right, and also told the conductor the same, probably in the presence of the engineer; that he then had them take the engine out on the bridge to test it, but that he did not suggest to them in any way that he thought it best to test the bridge (R., 148). It is also shown that one of the principal officers of defendant (Mr. McCabe) knew this bridge was not safe under certain conditions, by the bulletin issued by him to

the trainmen not to cross this bridge until they received the signal to do so by some one of the bridge men (R., 48-49, 171).

Various other material facts shown by the record will be stated in the argument.

ARGUMENT.

I.

The first assignment of error urged by counsel for plaintiff in error brings up the refusal of the trial court to sustain its demurrer to the evidence. Under this division of the argument of plaintiff in error, three propositions are suggested and urged:

1st. That the evidence introduced on behalf of defendant in error (plaintiff in the trial court) fails to show any negligence on the part of the plaintiff in error (defendant in the trial court).

2d. That, if any negligence existed, it existed equally on the part of the plaintiff as on the part of said defendant.

3d. That plaintiff assumed the risk.

In this connection it should be observed that the first of the three grounds hereinbefore stated was the only one urged in the trial court as a reason why the demurrer to the evidence should be sustained, as is shown on page 69 of the record; that immediately after its demurrer was interposed on behalf of defendant the court inquired of its counsel, "What point do you make?" to which Mr. Mosley answered, "We demur for the reason that no negligence is shown on the part of the defendant."

There is no doubt but that the evidence introduced on behalf of plaintiff is entirely sufficient to establish his cause

of action against the defendant under the rule obtaining in Oklahoma Territory, which is concisely stated by the Supreme Court of that jurisdiction in the following language:

"A demurrer to the evidence admits all the facts proven to be true and every fact which may reasonably and rationally be inferred from such facts proven; and where the evidence tends reasonably to establish each material averment of the petition, it is error to sustain a demurrer to the evidence."

Myers *vs.* First Presbyterian Church, 11 Okl., 544; 69 Pac., 874.

This was also the established rule obtaining in the State of Kansas, from which the Oklahoma Civil Code was adopted, at the time of such adoption:

"A demurrer to the evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove."

Christie *vs.* Barnes, 33 Kan., 317; 6 Pac., 599.

But, even conceding, for the sake of the argument, that at the time this demurrer was interposed plaintiff's evidence was in fact insufficient to show any negligence on the part of the defendant, still when defendant proceeded to introduce evidence in its behalf, and in so doing supplied this deficiency by introducing some which reasonably tends to show negligence on its part, then such defect was cured, and there is absolutely no question but that, taken as a whole, the evidence in the record not only reasonably tends to show negligence on the part of defendant, but conclusively shows it.

"Where a demurrer to plaintiff's evidence is overruled when, on account of some omission in the testimony, it should have been sustained, and thereupon defendant proceeds to offer testimony, and in so doing supplies the omission, *held,* that the error in the ruling on the demurrer is

corrected, and if, upon all the testimony in the case, the judgment was properly rendered, it will be upheld."

Atchison & N. R. Co. *vs.* Reecher, 24 Kan., 228.

See also—

Simpson *vs.* Kimberlin, 12 Kan., 579.

Pine *vs.* Western National Bank (Kan.), 65 Pac., 690.

It has even been held in a well-considered opinion by the Circuit Court of Appeals for the Eighth Circuit, in an action brought up from the Circuit Court of the United States from the District of Kansas, that—

"The introduction of evidence by defendant, after his demurrer to plaintiff's evidence is overruled, is a waiver of his right to rely on that ruling as error" (58 Fed., 144).

Several cases are cited by counsel for defendant under each of the foregoing subdivisions and we now consider them. It is suggested that an adequate test was made, and that the fact of the accident raises no presumption of negligence by the defendant. As to the last point named, it may stand admitted—the fact of the injury is not of itself sufficient evidence of the negligence of defendant. The first case cited to this point is that of Patton *vs.* T. & R. Railway Co., 179 U. S., 658; 45 L. Ed., 362. There a fireman at the close of a run cleaned his engine before it had been examined and inspected. A step was loose and he was injured. Judgment for defendant was directed below, and same is sustained by this court. The court, at page 663, states the three principal rules therein decided:

First. The fact of an accident, in such case, carries with it no presumption of negligence.

Second. That, in such a case, it is not sufficient that the employer may have been guilty of negligence, but the evidence must point to the fact that he was.

Third. That there is no liability on the employer to provide an absolutely safe place, but he is bound to use reasonable care under the circumstances.

These propositions are not denied by .plaintiff, and the answer to them is that *negligence was proved in the case at bar.* This is clearly shown by the evidence and found by the jury.

In the case cited by opposing counsel the plaintiff was working out of the course of his duty and was injured before the customary daily repair work on the engine had been undertaken. Aside from this, we suggest that there is a clear tangible difference in requiring a railway company to answer for every loose bolt and requiring a bridge-building company to provide at least a stable foundation for its bridges.

The third case cited hereunder is that of *In re* Michigan Steamship Co., 133 Fed., 577. This was the case of a vessel being refitted to burn oil. It was half full of petroleum of a low, inflammable grade. A workman was drilling a hole in the top of the tank and placed a lighted candle within a few inches of the hole. An explosion took place, resulting in the injury of plaintiff and others. The court holds that, while the owner of the tank might have been negligent in filling the same with inflammable and inferior oil, the workman was clearly negligent, it being a matter of common knowledge that petroleum carries a gas that will explode on contact with a flame, and that the workman's carelessness was the proximate cause. But we see a clear distinction between that case and this one. In the case cited the servant himself brought the two dangerous agencies in contact. The oil, though below standard, had no inherent defect and, if handled with care, was safe; but the bridge was inherently weak—the most careful and guarded use of it resulted in tragedy.

Counsel also cited the case of Baldwin *vs.* St. Louis, K.

& N. R. Co., 68 Iowa, 37 (25 N. W., 918). In this case plaintiff was an employee of the defendant railroad company and was engaged with another in taking a stick of lumber from a pile in the defendant's lumber yard. The pile of lumber fell on him and he was injured. He alleged that same was not properly piled, the cross-sticks being too short, and the court so found. The question arising in the case was as to whether or not it was the duty of the manager to see to the proper piling of the lumber, or was the duty of the employees. The court held that, the defect not being apparent from where plaintiff was engaged, the duty was on the employers to maintain the piles in a safe condition. Another instruction given in said case goes to the point that where a thing is originally properly constructed and the defect subsequently arises it would be incumbent on the plaintiff to prove notice to defendant or its proper agent of the existence of the defect. There is no question but that defendant had abundant notice. The destruction of the bridge by a previous flood, the breaking of the bridge under the first attempt to cross on the morning of the accident, the hasty nature of the repair work, the character of the bulletin previously issued by defendant—everything contributed to show notice to the defendant of weakened condition of the structure.

Under this heading is also cited the case of Knight *vs.* Cooper, 36 W. Va., 232; 14 S. E., 999. The case announces the rule that the mere fact of the accident is not presumptive evidence of negligence on the part of the company. The facts show that the plaintiff was employed in the most dangerous department of mining work—digging the roof of a mine. "He saw the fallen and falling slate all round him. Besides, the danger was pointed out to him, and he was warned and cautioned specially." The rules of the mine required him, when a roof was caving, to suspend work until it was propped and made safe by those who had that branch of the mining especially in charge. "He saw the danger and

reported it, and the props were on the way." Under these facts he went back to work and was injured. His right to recover is denied, and correctly so; but, as an authority denying the right of recovery in the case at bar, we suggest that the case is not in point.

Here also is cited the case of Chicago, B. & Q. Railway Co. *vs.* Kellogg, 55 Neb., 748; 76 N. W., 462; 74 N. W., 454. This was a suit brought by a station agent to recover damages for an injury received in the use of a defective brake. On the question of a safe place, the court quotes fully from the case of Railway Co. *vs.* Ryan, 52 Kan., 637, to the effect that "An employee of a railway company by virtue of his employment assumes all the ordinary and usual risks and hazards incident to his employment." That the fact of the accident would not establish negligence of the defendant, and that it would devolve on the plaintiff to show that the railroad company had notice of the defect; that proof of a single defective or imperfect portion of such machinery or instrument resulting in injury will not of itself be sufficient to prove that the company had notice. We do not question the rule as stated; but in the case cited the court announces and applies the very distinction that we contend for in the case at bar.

In subdivision 2 of the argument on behalf of defendant, under the first assignment, its counsel advance the question of contributory negligence. It is sought to maintain this point on the ground that plaintiff saw the tests and the repairs made, and that he should not have taken his place in the engine cab, but should have walked across the bridge in the rear of the train.

They cite hereunder the case of Hunt *vs.* Kane, 100 Fed., 256. In that case plaintiff was a workman in defendant's railway yards. His foot was caught in a defective frog in the track and he was injured. He attempted to signal the engineer, but the steam from the engine obscured him and his signal was not seen. The court holds that the engine having become defective after it was taken out, the crew, by retain-

ing it in use, waived the negligence of the company. Here again the defect was patent—escaping steam. In the case at bar it was a latent defect, with bridge-builders and general superintendent in immediate control declaring the bridge was safe.

In the case last cited an instruction was requested placing the duty absolutely on the plaintiff to note and avoid apparent dangers. The court, at page 260, sustains the refusal of such instruction, and lays emphasis on the fact that there must be an *apparent* defect; that where the night was dark and the block-work was to be repaired by *other parties*, plaintiff was not subject to the rule of assumed risk.

Counsel also cite the case of Hadyn *vs.* Smithville Mfg. Co., 29 Conn., 548. The points under which said case is cited may be said to embrace both the questions of assumed risk and contributory negligence. In that case a boy working in a cotton mill was injured by contact with an unprotected spinning frame. The frame was in the same condition that it was when he went to work. He had been working for three weeks. The case simply announces the rule that when one enters employment where there is unprotected and dangerous machinery he assumes the risk. It needs no argument to show that the facts of that case are materially different from those in the case at bar.

Another case cited by said counsel on this point is that of Pittsburgh, etc., Ry. Co. *vs.* Sentmeyer, 92 Penn. St., 276. In this case an employee of the defendant railway company was killed by being knocked off the top of a freight car by a bridge or gangway that spanned the tracks. The case is cited on both the question of contributory negligence and that of assumed risk, but the facts of the case clearly distinguish it from the one at bar. The deceased was a flagman on the train. He had been sent back to flag a following train and was on this latter when killed. He was not in the actual service at the time, and had nothing to do but remain in the engine or cab of this train until he

caught up with his own, and it was his duty to remain there. Instead of that he went out and climbed up on top of the cars. He had been on the road for three months and had passed under this bridge daily. We submit that the case is essentially different from the one at bar, wherein plaintiff simply remained at his place of duty.

In this same division of the argument counsel for defendant cite the case of Rains *vs.* St. Louis & I. M. R. Co., 71 Mo., 164. This case is practically identical with Deavitt *vs.* Pac. Ry. Co., 50 Mo., 302, hereinafter considered. A brakeman on a railway train in passing under a foot-bridge was killed. He had passed under the bridge for three months and knew that a man of ordinary height could not stand erect on the cars in passing under it. The court announces the rule that, though defendant was guilty of negligence, still if the plaintiff was also guilty of negligence proximately contributing to the injury, he cannot recover unless the negligent acts of the defendant occasioning the injury occurred after he became aware of the danger.

We suggest that the case at bar is essentially different in its circumstances. In the case cited the plaintiff had passed beneath the foot-bridge daily for three months; the danger was patent to every one; the most ordinary care would suffice and had sufficed to avoid all injury.

In the case of Deavitt *vs.* Pac. Ry. Co., 50 Mo., 302, cited by counsel for defendant, plaintiff's son was a brakeman and was killed while at work on the top of a freight car in passing under a bridge. The accident occurred in the daytime. When last seen near the bridge he was sitting on his brake on top of the car, facing the bridge. He had passed under the bridge daily for three weeks. Held, that deceased assumed the risk. The facts in said case show the clearest negligence on the part of deceased and a full knowledge of the dangers. The rule of law therein stated is not denied

by us, but the facts in that case are so widely variant from those in the case at bar that further comment is unnecessary.

Among the cases cited under the third subdivision of the first assignment is that of Writ *vs.* G. & L. Co., 91 Wis., 496; 65 N. W., 173. Here plaintiff was a workman on a bridge. The railway track of defendant crossed the bridge-work, and it was necessary to work on the track and clear it of timbers at the approach of a train. A skid had been left on the track and when the train was within eighty feet of plaintiff he tried to remove the skid from the track. He was caught by the engine and injured. The court says:

"He was not merely negligent but his act was a rash and almost reckless one. * * * His injuries were the result of his own grossly careless and rash conduct."

We submit that the case is in no sense analogous to the one at bar, where the plaintiff simply remained at his customary post of duty in full reliance upon the unequivocal statements of those in charge that the bridge was safe. In the case cited the plaintiff was a bridge-builder. In the case at bar plaintiff was engaged in an entirely distinct line of work. It was his duty to help run an engine between various points on the road, *and the momentary use of his engine to do some emergency work would not change the nature of his employment.*

Another case cited is that of Wright *vs.* Southern Railway Co., 80 Fed., 260. This was an action to recover damages for the death of an employee. The deceased was employed by defendant as a track-repairer. He was off duty and returning home from a near-by town on a hand-car. A fast train caught up with the car, and in getting it off the track he was killed. The attempt to remove the hand-car was in obedience to the orders of the foreman, but the court, at page 262, clearly bases its opinion on the negligence of the deceased. The court says:

"He was not engaged in actual service. * * * He knew that the fast train was due and expected; he knew that it had the right of way."

There is a fundamental difference between the two cases. In the one case a man who is off duty voluntarily and knowingly assumes a manifest danger. In the other a man simply remains at his place of duty. In the one case a known danger is rashly courted. In the other a fireman is told, by those who have constructed it, that the bridge is safe, and he goes upon it in his engine.

The case of Anderson *vs.* Winston, 31 Fed., 528, is also cited by counsel under this head. A gang of men were employed in excavation work. A slide of earth occurred and plaintiff was injured. The court says: "Every one of the men, except one, saw the crack in the earth." The case simply states the rule that one working in the face of apparent dangers cannot recover. There the plaintiff was engaged in excavation work and the defect was patent to all.

Here, too, is cited the case of Allen *vs.* Gilman, 127 Fed., 609. A better statement of the very point that we seek to establish would be difficult to find. The syllabus of that case reads as follows:

"Workmen who, by direction of the master's superintendent, undertook to remove the tamping from blasting holes containing charges of dynamite which had failed to explode, in reliance on the positive assurance of the superintendent that there was no danger after the failure of the electric battery to explode the charge, although they knew there was some danger, cannot be charged by the master as having assumed the risk therefrom; and they are entitled to recover for injuries received by reason of the explosion of the blast where it is found that they performed the work with proper care."

The court quotes fully from Sherman & Redfield on Negligence (fifth edition), vol. 1, section 186, and sustains the rule as there stated. A part of the section therein quoted reads as follows:

"Where a servant seeing a defect and notifying his master thereof, is nevertheless ordered to continue his work without any express or implied promise of a remedy, it has some-

times been held that he cannot recover, on the theory that from that time he assumes the risk. But this is unsound. * * * The true rule in this, as in all other cases, is that if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has the right to rely on his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely on his master's opinion. So, if the peculiar risk of the act commanded by the master is not obvious, the servant has the right to assume that he is not sent into any unsual peril, and that he is not bound to investigate into the risk before obeying his orders."

As applied to the case at bar, we believe the rule above stated is conclusive against defendant.

In support of our contention that negligence on the part of defendant is abundantly shown by the evidence in the case at bar, we call special attention to the following, in addition to that referred to in our statement of facts, to wit:

Mr. KIMLOCK, a witness for defendant, testifies in part as follows:

"Q. It is considered the better practice to send piling down to rock, is it?

"A. Yes, sir; where it can be done; in some cases they cannot do it.

"Q. And it is more particularly the better practice to do that where the material above the rock is sand or quicksand than if it is clay or some other substantial dirt?

"A. Yes, sir."

* * * * * * *

"Q. Does what is called the false work have to be as strong as is a similar kind of bridge made for permanent use?

"A. Yes; it is usually made stronger and more material in it.

"Q. Why is that?

"A. Why, in addition to carrying the weight of trains, it has also to carry the weight of this steel span, which in this case would mean about 250 tons extra, besides the weight of the trains" (R., 79).

Mr. HOMAN, another witness for defendant and the engineer under whose direction the entire work of constructing the railroad was being done, testifies in part as follows:

"Q. How deep can you put piling down by the jetty process?

"A. I really don't know, sir; you can put it down 30, 40, 50, or 60 feet; how far below that I don't know.

"Q. You can put it down just as far as the quicksand goes?

"A. Probably so" (R., 86).

* * * * * * *

"Q. Now, have you had any experience with any other river like that, prior to this time?

"A. With rivers of that character, yes, sir.

"Q. It is a fact, is it not, Mr. Homan, that these rivers, these quicksand rivers, like the South Canadian, change their channels frequently in times of flood, and very rapidly sometimes?

"A. Yes, sir; I think so.

"Q. It is a fact, is it not, that piling put down 18 feet may be in two or three hours washed clear out from the bottom—all the sand taken away from it?

"A. Well, I do not think it would scour as deep as 18 feet; it is something that no man can state, what occurs in that water" (R., 87-88).

Mr. WARREN, another witness for defendant, testifies in part as follows:

"Q. Suppose you had constructed a pile bridge or bridge supported by piles and put those piles in a depth of 18 feet and the first high water that came it took 3 or 4 bents or spans of your bridge, would you consider then that it would be good, skillful workmanship in bridge-building to put those piling back and put them the same depth and at the same places and build the bridge in the same way as before?

"A. I would not consider it a good plan if there wasn't enough to hold them up, no" (R., 95).

* * * * * * *

"Q. Then it would be safer to put it (piling) 30 feet than 18 feet, if it happened to scour 20 feet?

"A. Yes, sir" (R., 97).

Mr. FALLAHEY, another witness for defendant and foreman of its bridge gang, testified that he shoved a freight car out on the bridge for the purpose of testing its strength on the morning of the accident and prior to the arrival of plaintiff and the train crew, and in this connection gives the following additional testimony:

"Q. Why did you adopt that test; was it a usual or unusual test?
"A. It is an unusual test.
"Q. What is usually done?
"A. I never tested a bridge, but I just done that for my own satisfaction" (R., 132-133).

Referring to the sinking of one bent of the bridge when the engine first started to go over after the flat car, he further testifies:

"Q. You say it sunk?
"A. Yes, sir.
"Q. How far did it sink?
"A. About four inches.
"Q. Now, if that was on rock, how did it sink?
"A. I cannot account for it.
"Q. What did you do with it?
"A. I leveled it up and put on additional braces—jimmied it up.
"Q. What do you call jimmying it up?
"A. Why, leveling it up.
"Q. How did you accomplish that?
"A. By raising the track and putting in what is called jimmies" (R., 133-134).

* * * * * * *

"Q. Could the points of the piles of bent No. 17 get into the position in which you found them?
"A. They could not" (R., 138).

* * * * * * *

"Q. Did he (the chief engineer) have anybody representing him in charge there at that time?
"A. He had an inspector there, but he didn't represent him.

* * * * * * *

"Q. Was he there at the time of the accident?
"A. Yes, sir.
"Q. Did he have anything to say about fixing it up?
"A. No, sir.
"Q. Or fixing it before the accident?
"A. No, sir.
"Q. You had that in charge entirely?
"A. Yes, sir" (R., 144-145).

"Q. How far had they got out on the bridge when you first noticed there was anything wrong?
"A. They had got the trucks next to the engine out on bent No. 21.
"Q. Well, just explain to the jury what took place then.
"A. Well, the bridge settled, went down.
"Q. Down?
"A. Yes.
"Q. It didn't go sideways?
"A. No, sir.
"Q. It simply went down?
"A. Down.
"Q. Well, they came back?
"A. The engineer reversed the engine and came back.
"Q. As soon as it went down?
"A. They came back when I told them to come back.
"Q. Well, do you know how it came to settle down then?
"A. No, sir.
"Q. Did the piles remain in an upright position or were they slanting?
"A. They looked to me in an upright position.
"Q. Now, if they had been straight, with those piles resting on a solid rock below, they could not have settled, could they?
"A. I could not say what the bottom was.
"Q. But they could not have rested on a solid rock. If they had been resting on a solid rock, the piles might have bent sideways, but they could not have been pushed down, could they?
"A. I could not say as to that.
"Q. But you are positive that at that time the piles pushed down?
"A. Yes, sir.
"Q. And you think that they still remained in a perfectly perpendicular position?
"A. Yes, I looked at them and examined all of them.

"Q. You examined them and found that they were still perpendicular?

"A. Yes, sir.

"Q. So that the giving at that time that caused the engine to come back must have been straight down?

"A. Yes, sir; straight down" (R., 145).

As fully justified by the testimony hereinbefore stated and other testimony of similar import contained in the record, the jury, in answering interrogatories 9, 10, and 11, finds that defendant was guilty of actual, if not gross, negligence in the construction, reconstruction, and repair of this bridge (R., 189).

As the entire weight of the bridge rested upon the piles, there was certainly negligence in constructing it according to plans which permitted the piles to rest merely upon quicksand, which in time of flood might be washed away in a few minutes (R., 76-77), and especially in rebuilding it according to the same plans after twelve bents, or 192 feet, thereof had been washed out by the previous flood. It may be that the plans for the bridge were sufficient for a similar bridge over an ordinary stream; but whether it is negligence to construct a bridge of a certain kind at a particular place is not determined by the inquiry, whether such a bridge would be sufficient at an ordinary place, but by the inquiry whether by the exercise of due care the defendant should have known that such a bridge was not sufficient at that particular place.

The case of Terre Haute & I. R. Co. *vs.* Fowler (Ind.), 56 Northeastern, 228, was brought for damages for the death of a freight conductor caused by the breaking through a trestle of an engine on which he was riding. The evidence showed that the stream across which the bridge was built was subject to sudden rises, and when at flood carried a large quantity of driftwood; that such floods had occurred on three occasions in twenty-one years; that the bridge in question did not leave a sufficient space for the passage of driftwood; that the bents were placed on the rock bottom of the stream without any anchorage in the rock, instead of

being suspended in quicksand as in the case at bar. It is held that—

"Although the bridge was new and well constructed for a bridge of this kind, it was insufficient, owing to the character of the stream, and the evidence showed negligence on the part of the railroad company sufficient to support a verdict for the plaintiff."

The case of Van Amberg *vs.* Railroad Company, 37 La. Ann., 650; 55 Am. Rep., 517, is also clearly in point. The syllabus of the case is as follows:

"A railroad company is liable for a personal injury to a locomotive engineer caused by an unsafe bridge, while the road was in course of construction and not open for trade or travel."

And the case of Copeland *vs.* Wabash R. Co. (Mo.), 75 S. W., 106, is practically on all fours with the case at bar. It is there held that—

"A railroad company owes the duty to its trainmen to construct and maintain reasonably safe bridges; and, having constructed a pile bridge where it was not reasonably safe, because of the high, swift water in case of rain, the floating logs, and the insufficiency of the earth under it to support piles, whereby it gave way under a train, injuring the conductor, it is liable for the injury.

"Evidence, in an action for injury to a conductor by the giving way of a pile bridge under his train, *held*, sufficient to support a finding that the earth under the bridge was insufficient to support the piles."

In the opinion of the court in said case the following language is found:

"It is clear from these excerpts from the evidence that there was some evidence tending to show that the earth under the bridge was insufficient to support the piles. Its weight was, of course, for the consideration of the jury. * * * And while the fact that the bridge went down under the train did not of itself make out a *prima facie* case in plaintiff's favor, and it was incumbent on him to

show how and why the accident occurred, the falling of the bridge was one of the incidents which occasioned the injury, so that the case does not stand alone on the fact that the bridge fell and that plaintiff was injured; but if, in connection therewith, the evidence showed that the bridge was a pile bridge, and on account of the character of the stream and the country drained by it such a bridge at that locality was not reasonably safe, * * * or that there was not sufficient earth around some of said pilings, and for that reason the bridge was not reasonably safe, or for any or all of the reasons it fell and injured plaintiff, and that defendant knew of the unsafe condition of said bridge, or by the exercising of reasonable care and diligence could have ascertained the same before the arrival of the train upon which plaintiff was conductor at said bridge, he made out a *prima facie* case entitling him to go to the jury, and it then devolved upon defendant to overcome this *prima facie* case, and to show by the weight of the evidence to the satisfaction of the jury that the accident was attributable to some other cause."

While, as opposing counsel suggest, the rule is that the mere fact of the happening of an accident causing injury to one of its servants furnishes no evidence of negligence on the part of the master, yet when a structure such as a railroad bridge gives way and falls while being used for the purpose and in the manner intended by the master, and injury thereby results to one of its employés, the fact of such accident is a matter to be considered by the jury, together with all of the surrounding facts and circumstances, in determining whether or not the master has been guilty of negligence; and many well-considered cases go to the extent of holding that the fact of its falling, under such circumstances, furnishes sufficient evidence of negligence, on the part of the master, in the construction thereof, to make out a *prima facie* case in favor of the party injured.

Copeland *vs.* Wabash R. Co., *supra.*

Hardesty *vs.* Largey Lbr. Co., 86 Pac., 29.

Westland *vs.* Gold Coin Mining Co., 101 Fed., 59.

Bradford Glycerine Co. *vs.* Kaiser, 113 Fed., 894.

1 Thompson on Negligence, section 15.

Another thing to be given weight in this case is the fact that a positive assurance of safety had been given plaintiff shortly before he attempted to cross the bridge. In the case of Haas *vs.* Balch, 56 Fed., 987, Judge Shiras, speaking for the court, says:

"The fact that an assurance of safety has been given is one to be weighed in this case. The weight to be given thereto is dependent upon the circumstances of the particular case. * * * On the other hand, if the master or his representative has superior knowledge or means of knowledge of a given situation and of its safety or to the contrary, and he assures the servant that he can safely undertake a given work, such an asurance may justify the servant in undertaking the work in reliance upon the superior knowledge of the master, and without being liable to the charge of negligence in so doing, unless the danger, in the language of the Supreme Court in the District of Columbia *vs.* McElligott, 117 U. S., 621; 29 L. Ed., 946, is 'so imminent or manifest as to prevent a reasonably prudent man from risking it.'"

See also 4 Thompson on Negligence, section 4669.
Kerrigan *vs.* Chicago, etc., R. Co. (Minn.), 90 N. W., 976.

It is next insisted by counsel for defendant that—

"If negligence existed, it existed equally on the part of plaintiff as on the part of the master. The plaintiff was present when the first accident happened: he saw the lents give way; was on the engine at the time; he saw the bridge repaired; he assisted in the repair; he took part in the tests of running the engine over the bridge and back again; he saw the turbid stream; he saw that Fallaha and the gang were there protecting the bridge from driftwood, etc. (Brief, 19).

The foregoing contention may be fully answered by an examination of the portions of the evidence showing the duties falling within the line of plaintiff's employmen, his knowledge of bridge construction, his connection therewith at the time of the accident, etc.

Mr. WATERS, the engineer, gives the following testimony as to his connection with the repairing of the bridge in question:

"Q. What did you suppose they did more than look at the water and the bridge?

"A. I knew they was fixing the bridge.

"Q. Well, you helped do that?

"A. No, sir; all that I did of it was to pull it back in place with the engine. I wasn't working on the bridge" (R., 57).

The plaintiff testifies concerning this matter, in part, as follows:

"Q. Who did you find there on the bridge when you got there, if anybody?

"A. Found Mr. Fallaha with a gang of about—well, I don't know—twenty or thirty men, I should judge.

"Q. What were they doing?

"A. They were working on the bridge" (R., 58).

* * * * * * *

"Q. What were those bridge men doing while you were there?

"A. Well, after we had started down, we backed up and got off the engine and went over and looked at it, and they got a couple of ropes—I don't remember just what it was—and fastened them to the bridge somewhere and coupled onto our engine—the front part of our engine—and told us they wanted to make a slow pull on this bridge, and we went back and got on the engine and we made the pull to brace it and straighten it back.

"Q. Well, what were they doing after that?

"A. Well, they went to work on the bridge—all this crew.

"Q. Where were they with reference to the bridge, on top of it or underneath it?

"A. There was some of them on top and some of them underneath; more of them were underneath the bridge, I think.

"Q. Where were Fallaha and Pratt?

"A. Well, they were everywhere; they were on top of the

bridge and underneath the bridge and everywhere else—both of them" (R., 58-59).

The plaintiff further testifies on the question of his lack of experience in this class of work as follows:

"Q. Mr. Wilson, you may state whether or not you had ever had any experience prior to this accident with reference to the construction of railroad bridges or any other kind of bridges?

"A. No, sir; these were the first construction people that I ever worked for."

* * * * * * *

"Q. What, if any, experience did you have while you were working for McCabe & Steene about building bridges?

"A. I didn't know anything about it at all; it was out of my line of business" (R., 64).

Mr. FALLAHEY, defendant's bridge foreman and one of its principal witnesses, gives the following testimony:

"Q. Did you see the plaintiff here, at that time, this man Wilson who was fireman on that Engine?

"A. Yes, sir; I seen him; yes, sir.

"Q. What was he doing then?

"A. He was on the engine and I seen him also on the ground.

"Q. Did he assist in jimmying up that bent there or doing anything with reference to it?

"A. No, sir; not that I know of" (R., 134).

In attempting to show that Mr. Pratt was not defendant's general superintendent, its witnesses repeatedly testify that his duties were confined exclusively to the management of the train service and had nothing whatever to do with the bridge-building or other construction work.

Mr. FALLAHEY gives the following testimony on this point:

"Q. Now, what was your position?

"A. My position; I was foreman of that bridge gang.

"Q. And Mr. Pratt had charge of the train service on it?

"A. Yes, sir" (R., 139).

* * * * * * *

"Q. And your understanding was that all Mr. Pratt had to do was just to superintend the running of those four engines?
"A. Yes, sir.
"Q. And didn't have anything to do with the bridge-work?
A. No, sir.
"Q. That was an entirely separate department of the business?
"A. Yes, sir.
"Q. He didn't have anything to do with employing hands in your department?
"A. No, sir."

* * * * * * *

"Q. Were your duties and the duties of the men under you in any way connected with Mr. Pratt or the men under him?
"A. None whatever that I know of" (R., 149-50).

Mr. STEEN, one of the principal stockholders and officers of defendant, gives the following testimony on this point:

"Q. Did you move trains on this work?
"A. Yes, sir.
"Q. Who had charge of the moving of your trains?
"A. Jim Pratt.
"Q. Who had charge of the trainmen?
"A. Jim Pratt."

* * * * * * *

"Q. Did Mr. Pratt have any authority with reference to the bridge-building?
"A. Not a bit."

* * * * * * *

"Q. What was his authority?
"A. Mr. Pratt was foreman of the trainmen; had charge of the train service.
"Q. Did he have authority to discharge and hire trainmen?
"A. Yes, sir.
"Q. Did he have authority to hire and discharge men in the bridge department?
"A. No, sir.
"Q. Did he have any authority with reference to the con-

struction or the repair of the bridge over the Canadian River?

"A. No" (R., 159-60).

* * * * * * *

"Q. Now, you say Mr. Pratt had charge of the train crew?

"A. Yes, sir."

* * * * * * *

"Q. That is, he had authority to direct the movements and conduct of the trains and trainmen?

"A. Yes, sir" (R., 163).

Mr. McCABE, another of the principal stockholders and officers of defendant, gives the following testimony on this proposition:

"Q. And Mr. Pratt had in charge the hauling and distribution of that material?

"A. Yes, sir.

"Q. And had under his control the men that operated these trains?

"A. Yes, sir" (R., 165).

See also page 170 of the record.

In fact, counsel for defendant, in arguing that Pratt was not the general superintendent, repeatedly assert that the operating department of this construction work was entirely separate and distinct from the bridge-building department. For instance, they say, among other things, "that Jim Pratt had charge of the moving of the trains and had charge of the trainmen, but was not any general superintendent; that Pratt had no authority with reference to bridge-building, but that Fallahay had" (Brief, 10).

Again, they say "that Mike Fallahay was foreman of the bridge-building; that Mr. Pratt had nothing to do with bridge-building and had no charge of it whatever. * * * Mr. Pratt's sole duties was the train service; he hired trainmen, directed the trains, and hauled the material to the front" (Brief, 12).

It is next contended by counsel for defendant "that the plaintiff assumed whatever risk was attendant upon crossing

the bridge." Under this head, counsel for defendant make practically the same argument as on the fellow-servant proposition and add the following statement:

"Neither is it sound to say that he was excusable because of the fact that the master had to furnish a safe place for him to work, and the bridge was such a place, for the reason that he was actually employed in the construction and repair of the place itself, and all of this was shown by plaintiff's own evidence."

The evidence referred to is that hereinbefore quoted, and we submit that it does not even tend to support counsel's contention on this point. In addition to the evidence above quoted, we call special attention to that given by Mr. McCabe on pages 171 and 172 of the record, relating to the bulletin of instructions that he gave to the trainmen, which evidence is, in part, as follows:

"Q. Now, did you expect those engineers coming along there, and especially at night, to go out and see whether the bridge was safe before crossing it?

"A. If there was a rise in the river, we certainly did.

"Q. Expected them to determine——

"A. Expected them to look out and see that it was all right if there was a rise in the river.

"Q. Do you suppose that any engineer that you had on your line could have determined that?

"A. If there was a strong current in the river they didn't ought to cross it, because they all knew that it was a treacherous stream.

"Q. It was not a bridge, then, that it would be safe to cross when there was a swift current in the river, in your judgment?

"A. Well, if there was drift up against it they ought not——

* * * * * * *

"Q. Well, suppose there was no drift and the river was up?

"A. It looks like it ought to be safe.

"Q. Then you did expect them to cross it?

"A. Well, they were to use their own judgment—if they thought it was safe to cross it.

"Q. Oh, well, you didn't tell them anything about that in the bulletin?

"A. No, sir.

"Q. Well, suppose the foreman of the bridge gang and the gang were there at work and Mr. Pratt, the superintendent, the roadmaster that handled the trainmen, would you expect the engineer and fireman to determine then whether they ought to cross the bridge?

"A. No."

Here we have the direct representative and managing officer of defendant testifying in effect that, according to his understanding, it was the duty of the fireman and engineer to act on the advice of the bridge foreman and the superintendent or train master as to whether or not the bridge was in such condition as to be safely crossed by the former with their engine and train. In view of this state of the testimony, it is really passing strange that counsel for defendant so earnestly argue that the question of a safe place is not involved in this controversy, and that Pratt, Fallahay, Waters, and plaintiff were fellow-servants, and consequently the defendant owed no duty to plaintiff in the matter of furnishing a reasonably safe road-bed, including bridges, upon which his engine could be operated. In this connection, we submit that not a single case cited by said counsel supports the doctrine contended for as applied to a state of facts similar to that disclosed by the record in the case at bar.

In the case of Toledo, etc., Ry. Co. *vs.* Conray, 68 Ill., 560, a railway bridge gave way under an engine, and the court in passing on the liability of the railroad company holds that—

"While it is true that a railroad company is not liable for an injury to a servant occasioned by the negligence of a fellow-servant in the same line of employment, yet this rule has no application to an injury caused by defects in the machinery of the company, its tracks or bridges, which it might have known and provided against by the exercise of the highest care and diligence, it being the duty of such

companies to furnish their servants safe materials and structures and keep them in proper repair."

See also Schillinger Bros. Co. *vs.* Smith (Ill.), 80 N. E., 65.

In Elmer *vs.* Locke, 135 Mass., 575, it is held that—

"A brakeman in the employ of a railroad corporation may maintain an action against the corporation for personal injuries occasioned while in the exercise of due care, by the fall of a trestlework supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall is caused partly by the defective construction of the trestlework and partly by negligence of the fellow-servants of the plaintiff."

See also, on question of master's liability where his negligence mingles with that of fellow-servants, 4 Thompson on Negligence, section 4856 *et seq.*

In the opinion of the court in Elmer *vs.* Locke, *supra*, it is said that—

"The contention of the defendant is that he is not responsible for the defective construction of this spur track, it not being shown that he failed to employ suitable persons or to provide suitable materials therefor; that if there was negligence therein it was that of a fellow-servant of the plaintiff, engaged in the same general business with him; and that he cannot recover, as it was one of the ordinary risks of the employment in which he engaged and for which he must be deemed to have received compensation.

"While it is well settled that, if a master uses reasonable care in the selection of his servants and in supplying and keeping in repair suitable structures, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management or use of such structures in carrying on the master's work, it is equally clear that he is bound to use reasonable care to keep the engines with which, and the buildings, places, and structures in, upon, or over which, his business is carried on, in a fit and safe condition, and that he is liable to any of his servants for injuries suffered by reason of his negligence. Nor can he escape responsibility

where it is his duty to supply suitable structures, instrumentalities, or appliances by proving that he delegated to a proper agent their construction, superintendence, or repair."

It is further said in the opinion of the court in that case:

"When a track exists as permanent as that which the evidence showed in this case to have been laid, and is intended to remain until the work is completed, it is an instrument for the use of those who conduct and manage the trains, such as they have a right to expect will be prepared with due care and to whose strength they may safely confide."

In the opinion of the court in Van Amberg *vs.* Ry. Co., *supra* (37 La. Ann., 653), it is said:

"No company has any right to trifle with the lives of its employees, or to put them in greater peril than is incident to the nature of their employment. It cannot for the sake of economy or other causes fail to make even its temporary structures sufficiently safe for the contingencies of its special work."

This statement is quoted with approval in the recent case of Lynn *vs.* Antrim Lr. Co. (La.), 29 So., 874.

In Pursley *vs.* Edgemoor Bridge Works, 67 N. Y. Sup., 719, it is held that—

"One engaged on the construction of a scaffold between piers in a river, for erection of bridge, through an efficient laborer, does not, as matter of law, assume the risk of collapse of the scaffold from improper driving of the piles and bracing of the structure, not being familiar with the principles and methods of construction."

See also 4 Thompson on Negligence, section 4259.
Union Pac. Ry. Co. *vs.* Snyder, 152 U. S., 683; 38 L. Ed., 597.
Northern Pac. Ry. Co. *vs.* Peterson, 162 U. S., 347.
Copeland *vs.* Wabash R. Co., *supra.*
3 Elliott on Railroads (2d ed.), section 1271 *et seq.*

In the case of Giles *vs.* Diamond State Iron Company (Del.), 8 Atlantic, 368, the plaintiff was a carpenter work-

ing on the roof of a building being constructed and was injured by the falling of the building caused by the walls being negligently made of insufficient thickness, and it was held that plaintiff could recover. In the opinion, on page 371, the court says:

"In the view we take of this case, he was, under the facts and circumstances proved on both sides, no more bound to inspect the wall of that building, before he went upon the roof to ascertain the safety of relying upon it, than would an engineer about to take service with a railroad company be bound before doing so, in order to secure to himself a right of action against the company in case of injury by the breaking of a decayed bridge or culvert, to first go along the line and inspect the road over which he was to drive his engine. Such caution, circumspection, or diligence would not be required of him."

There is no force whatever in the suggestion of counsel for defendant that plaintiff could have avoided the injury by walking over the bridge behind the train. In Louisville & N. R. Co. *vs.* Ward, 61 Fed., 927, it is held that—

"The fact that a switchman, injured while coupling cars, by reason of a hole in the track, might have selected another place to make the coupling, if he desired, will not defeat his recovery for the injury, unless he knew, or ought to have known, of the danger incurred."

In Tenn. Coal, Iron & R. Co. *vs.* Henderson (Ala.), 14 So., 287, the rule is stated as follows:

"The mere fact that plaintiff's intestate was injured because of the way of performing a duty which he selected, when, if he had selected the other way, injury would have been avoided does not conclusively show contributory negligence."

See also L. & N. R. Co. *vs.* Pearson, 12 So., 176.

In the case at bar there was, in fact, no other place than that occupied by plaintiff in which he could perform the duties required of him. In other words, he was at his post

of duty and in his proper place at the time the accident causing his serious injury occurred.

See also Louisville & N. R. Co. *vs.* Pearson (Ala.), 12 So., 176.

In Valley R. Co. *vs.* Keegan, 87 Fed., 849, it is held that—

"Where a railway employee, whose duties for several months have been to couple cars in the railway yards a mile long and containing 22 tracks, was injured through catching his foot in a hole between the rails, which hole had existed for two months, the court is not justified in holding, as a matter of law, that he had assumed the risk incident to such defect.

"To justify the presumption that a railway employee knew of a dangerous defect in the road-bed, it must appear that the defect and its danger were obvious to one at all attentive."

See further generally on the propositions of contributory negligence and assumption of risk:

Gardner *vs.* Mich. Central R. Co., 150 U. S., 348; 37 L. Ed., 1107.

Union Stock Yards Co. *vs.* Goodwin (Neb.), 77 N. W., 357.

Jemnienski *vs.* Loeb Car Wheel Co. (Del.), 63 Atl., 935.

Ross-Paris Co. *vs.* Brown (Ky.), 90 S. W., 568.

Hamner *vs.* Janowitz (Ia.), 108 N. W., 109.

Ill. Steel Co. *vs.* Zienkowski (Ill.), 77 N. E., 190.

Columbian Enameling & Stamping Co. *vs.* O'Burke (Ind.), *ibid.*, 409.

It is also a well-settled rule that—

"Where a person is told that a defect has been repaired by some one authorized to make the repairs, and he acts on the belief that the repairs have in fact been made, and is injured, he is not charged with an assumption of the risk."

4 Thompson on Negligence, section 4669, citing Kerrigan *vs.* Chicago, etc., R. Co. (Minn.), 90 Northwestern, 976.

In the case at bar both Fallaha and Pratt stated that the bridge was safe, not as a matter of opinion, but as an ultimate fact.

As before seen, defendant's evidence in the case at bar shows that bridge construction was a distinct branch of the work; that Pratt and his trainmen had no authority therein. This being so, the liability of the master to provide a safe place must be enforced without reference to the relation between Pratt and plaintiff. The duty of the master to furnish a safe place for its employees to work is an independent one. The inalienable character of this duty is fully recognized in the Baugh case (149 U. S., 368), cited by opposing counsel, in this language:

"He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. * * * This court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a co-employee, but upon the character of the act itself, and a breach of the positive obligation of the master."

In the case of Union Pacific Railway Co. *vs.* Snyder, *supra* (152 U. S., 683), the second paragraph of the syllabus reads as follows:

"It is the master's duty to exercise reasonable care to furnish suitable machinery and appliances and to keep the same in repair, and to make inspection thereof, and he cannot interpose as a defense in an action for injury to a servant the neglect of another servant to perform that duty."

We conclude our argument on the question of the master's liability for failure to furnish a safe place for its employee to work by calling special attention to Northern Pacific R. Co. *vs.* Peterson, 162 U. S., 347 (353), wherein it is said:

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. * * * If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employee, and if the employee suffer damage on account thereof, the master is liable. If instead of personally performing these obligations the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

II.

Under the second and third general divisions of their brief (which we shall consider together) counsel for defendant contend that because plaintiff alleged negligence on the part of said defendant in the original construction, rebuilding, and repair of the bridge, it was error for the trial court to instruct the jury that, notwithstanding the evidence showed that defendant did not originally construct the bridge, yet it was estopped from claiming that it was not operating the train or to deny that Pratt, Fallahay, and plaintiff were in its employ at the time of the accident, and that if the work of construction and rebuilding said bridge was negligently done and the accident occurred on account of this fact, then, if defendant knew of such negligent construction, it would be bound the same as if it had itself performed the work. This contention was evidently not urged in the brief or argument of counsel for defendant

before the Territorial Supreme Court, else that court would certainly have taken some cognizance thereof, and it is an established rule of said court that assignments of error not specifically urged in the brief are waived (Friedman *vs.* Weisz, 8 Okl., 392). However, assuming that the question was properly presented to the court below, and consequently is properly before this court, there are several very cogent reasons why said contention is not tenable.

In the first place, the answer on which defendant went to trial did not originally contain a general denial. The answer, as copied on pages 24 and 25 of the record, is not the answer as originally filed; but, as so filed, the first paragraph thereof, which is the only one attempting to plead a general denial, reads as follows:

"Comes now McCabe & Steen Construction Company, a corporation, defendant, by its attorneys, and for answer, denies all and singular the allegations contained in the petition, *in manner and form as therein set forth*, and demands strict proof thereof, and of this it puts itself upon the country."

Near the conclusion of the trial (R., 166) the defendant was permitted, on certain conditions, to amend this paragraph by striking out the words "in manner and form as therein set forth." Previous to this amendment the denial was merely a negative pregnant.

Spencer *vs.* Turney & Co., 5 Okl., 683.
Jackson *vs.* Green (Okl.), 74 Pac., 502.

As the answer formerly stood, it did not deny the allegations of the petition, but merely denied that these allegations were true in manner and form as pleaded, leaving as a fair inference that the allegations were substantially true.

As shown on said page 166, the court permitted this paragraph of the answer to be amended so as to make it an unverified general denial, on condition "that if a continuance by reason of this amendment is taken by plaintiff, the

defendant shall be taxed with all the costs." Upon this amendment being permitted, counsel for plaintiff stated "that if it is permitted to show by testimony that the McCabe & Steen Construction Company were not building this road and were not building the bridge, then the plaintiff will have to make a showing and ask for a continuance of the case in order to reform the pleadings." In response to this statement the leading attorney for defendant said: "Well, we have not offered that testimony yet."

Now, all the testimony offered by defendant tending to show that it was not the party which originally constructed and rebuilt this bridge had been so offered, and either admitted or rejected, before the foregoing statement was made by defendant's counsel. After the making of this amendment no evidence whatever was offered touching this matter, and at the time of making same defendant's counsel said they had not previously offered any such testimony, and, as above stated, proceeded with the trial without thereafter referring to the matter.

It will also be observed that the portion of instruction numbered ten, given by the trial court, stating that the undisputed evidence showed that the bridge was not originally built by defendant, etc., was given in the exact language requested by counsel for defendant, and was clearly against the interests of plaintiff, and was not justified by the evidence, especially under the statement of defendant's counsel (R., 181, 185-186).

It is also worthy of note that, at the time said counsel filed the answer on behalf of defendant, they did not know of the alleged fact that the McCabe & Steen Construction Company had not originally erected and rebuilt this bridge, but claim to have discovered this fact a few weeks before the commencement of the trial, but never disclosed same to plaintiff or his counsel. (See the affidavit of Mr. Moseley in support of the application to amend answer—R., 175). It follows, then, not only that the defendant in its answer raised no issue as

to the plaintiff, Pratt and Fallaha having been in its employ at the time of the accident, but in the preparation of said answer it was not intended to put these facts in issue. Nor was it intended to put in issue the fact that said defendant had the original contract to do this work. Said affidavit reads in part as follows :

"I drew this answer and sent it here to be filed, and at the time I drew it and had it filed I had no knowledge of this defense or this fact, and did not know other than that the McCabe & Steen Construction Company did this work and had this original contract."

Our statute on "Pleadings in Civil Actions" provides, among other things, that—

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect" (Sec. 146, Art. 8, chap. 66, Wilson's Ann. Stat.).

And the Oklahoma Supreme Court has repeatedly construed this statute to mean what it says.

Snyder *vs.* Stribling, 89 Pac., 222.

Kuhl *vs.* Supreme Lodge (Okl.), 89 Pac., 1126.

In view of the facts that counsel for defendant had no intention to raise such an issue at the time of filing its answer and stated that he did not intend to introduce evidence on such issue at the time he was permitted to amend the general denial, and that neither plaintiff nor his counsel were advised of any intention to raise such issue after opposing counsel claim to have discovered what the real facts were, would it not now be a positive injustice to reverse this case on the ground that the negligence alleged in plaintiff's petition may be slightly different from that upon which the recovery was had?

But, as well stated in the opinion of the Oklahoma Supreme Court—

"This action was begun and has been prosecuted upon the claim of the negligence of the construction company in the premises, and plaintiff has recovered on that theory. The question of assumed risk * * * has been submitted to the jury * * * and we cannot say as a matter of law that the decision of the jury was erroneous" (R., 213-214).

And, as before seen, that court says in effect that it has considered and passed upon all the proposition urged by counsel for defendant as grounds for reversing the judgment of the trial court and the one now under consideration is nowhere mentioned in said opinion.

It is also important to note in this connection that counsel for defendant requested the trial court to give to the jury that portion of instruction No. 10 which they now claim is utterly inconsistent with instruction No. 4, also given by the trial court; see No. 14 of the instructions specially requested by them (R., 181), and that instruction No. 4, so given by said court (R., 183-184), is in the identical language of instruction No. 3, so requested by said counsel (R., 177-178). The formal request for the giving of these special instructions by counsel for defendant reads as follows:

"Comes now the defendant and requests the court to give the following special charge No. 1 and that if refused that special charge No. 2 be given and if refused that the other special charges here requested be given in the order in which they are numbered" (R., 176).

Following this are the fifteen special instructions requested by said counsel, the third, seventh, eleventh, and thirteenth of which were given by the trial court in the identical language requested, as will be seen by comparing those so requested with instructions numbered 4, 6, 8, and 9 respectively of those given by the court; and each one of these requested instructions assumes that defendant is the party which constructed and repaired this bridge and is absolutely

inconsistent with their special instruction No. 14, which was given *in hæc verba* by the trial court in instruction No. 10, but with the following modification:

"unless you further find that the defendant knew the construction of said bridge, in which event it would be chargeable the same as though it had caused it to be built. And, in this connection, you are further instructed that the defendant is estopped from claiming that it was not operating the train in question or that Fallaha, Pratt, or plaintiff was not in its employ, and that it was not in existence at the time of the alleged injury."

The entire tendency and purpose of this modification was to make said instruction numbered 10 harmonize with those previously given, many of which, as before stated, had been specially requested by defendant (R., 177, 179, 180-181, 183-185).

Thus it is seen that the portion of the instruction complained of as being inconsistent with some of those preceding it was given at the request of counsel for defendant, is based upon no evidence which could properly be considered, presents a question not raised by the pleadings, was disregarded in the actual trial of the case, was ignored in both the verdict and special findings of the jury, and was not even urged in the court below as a ground for reversal.

It is certainly unnecessary either to argue or cite authorities to the effect that a party cannot complain because the court gave instructions which were requested by him.

That the point now made against the correctness of said instruction numbered 10 and now sought to be raised as a ground for reversal was clearly ignored by defendant, both in the trial court and the court below, and that the trial of the cause proceeded and was concluded on the theory that said defendant had originally constructed, rebuilt, and repaired the bridges in question is further shown by paragraph 6 (Second Subdivision) of defendant's motion for a new trial, which reads as follows:

"That said verdict is contrary to law, in this, that the evidence does not show any facts or circumstances carrying notice to the defendant of the rise in said stream, or any fact or circumstance indicating that defendant ordered the plaintiff to cross said stream in the risen and dangerous condition, but tends to show that the first bridge was disturbed by drift and not by washout, and that defendant had taken every precaution to protect the repaired bridge from drift, and had protected it from drift, and had no reason to apprehend that a second or other rise would affect the bridge differently from the manner in which it was affected by the former rise in the river; and, further, that it had issued to the trainmen and caused to be posted a bulletin, of which plaintiff and the other trainmen in charge of said train had full notice, to the effect that before crossing the bridge upon the South Canadian River all trains must be stopped and the trainmen must see that said bridge was safe and clear" (R., 192).

If defendant was in existence at the time of the issuing of the bulletin referred to in the foregoing paragraph, it was certainly in existence at the time of rebuilding and is the party that rebuilt the bridge and was having same repaired at the time of the accident.

In Snyder *vs.* Stribling (Okl.), 89 Pac., 222, the fifth paragraph of the syllabus reads as follows:

"Although an instruction may misstate the law, if others are given which, when taken together with the improper one, make it apparent that the jury was not misled thereby, the same will not constitute reversible error."

In Kuhl *vs.* Supreme Lodge (Okl.), 89 Pac., 1126, it is held that—

"Although an instruction may contain an improper statement of law, if it is clearly apparent from the whole record that no prejudice has in fact resulted thereby, the error will not be considered."

In the case at bar the trial court gave to the jury the following specific direction as to how they should consider the

instructions given, to wit: "You will consider these instructions altogether; you have no right to consider any part or parts of them to the exclusion of other portions thereof" (R., 187). Considered as a whole, we submit that no error prejudicial to defendant can be found in said instructions.

Furthermore, the change of the legal existence of this firm from a copartnership to a corporation was not a very material one, as McCabe and Steen, who were the sole members of the copartnership, owned 96 per cent. of the capital stock of the corporation (R., 155). Under this state of affairs, we insist that defendant, if it had knowledge of defects in the original construction or rebuilding of this bridge, or had knowledge of such facts and circumstances as would put a reasonably prudent man upon inquiry which would have led to the discovery of such defects, is liable to plaintiff to the same extent as if it had performed the original work of constructing and reconstructing said bridge.

"Where a railway company buys the line of another company, embracing a bridge obviously unsafe in plan and construction, and fails to correct the defects, and one of its employees is injured by the fall of the bridge, the company is liable, although the bridge had been in use for several years before the purchase without accident."

Vosburgh *vs.* Lake Shore & N. S. R. Co., 94 N. Y., 374.

See also Bogart *vs.* Del., L. & W. R. Co. (N. Y.), 40 N. E., 17.

In any event, the court correctly instructed the jury that said defendant was estopped to deny its existence at the time of the accident, or that Pratt, Fallaha, and plaintiff were in its employ, as these facts had not been properly denied, but rather affirmatively alleged by the answer filed on behalf of defendant. Surely this court will not reverse the Oklahoma Supreme Court upon a question of practice such as that involved in the holding by that court to the effect that, under certain provisions of the Oklahoma Civil Code on the subject of pleadings, defendant's answer fails to

effectively deny the foregoing material averments in plaintiff's petition.

Salina Stock Co. *vs.* Salina Creek Co., 163 U. S., 109.

The ruling of the Oklahoma Supreme Court excluding evidence contradictory to defendant's answer is in accord with its prior holding.

In the case of Herald Shoe Company *vs.* Oklahoma Publishing Company, 15 Okla., 29; 79 Pac., 111, this same point was presented and the court held the appearance of the corporation to the suit admitted its corporate existence, and that it had no right to deny that the one acting as agent never had such authority.

But there is still another sufficient reason why defendant should not be relieved of liability to plaintiff on the ground of its not being the party that constructed and rebuilt said bridge. The alleged assignment of the contract from McCabe & Steen, a partnership, to McCabe & Steen Construction Co. appears in the record at page 176 and reads as follows:

"For value received, we hereby assign, transfer, and set over unto the McCabe & Steen Construction Company the within contract, together with any and all rights therein existing in our favor, subject to all the conditions and provisions contained in said contract. And the said McCabe & Steen Construction Company is hereby expressly authorized to collect and recover any and all sums of money due or to become due as under said contract."

From which it appears that the assignment to the construction company was made "subject to *all the conditions and provisions contained in said contract.*" The acceptance contains an agreement *to comply with all the conditions contained in said contract.* The contract referred to does not appear in the record and there is nothing to show whether there was or was not an assumption of particular liabilities by the assignee. This assignment, without the contract to which it relates, is incomplete and uncertain and must be construed to sustain the decision below if possible.

In the case of Red River Cattle Co. *vs.* Sully, 144 U. S., 209; 36 L. Ed., 407, the syllabus of the case reads as follows:

"Where the only errors assigned which call for consideration depend upon the terms and the construction of a contract which does not appear in the record, the judgment will be affirmed."

In Masters *vs.* Freeman, 17 O. St., 323, it is held that a contract whose terms are obscure should be interpretated in the light of the surrounding circumstances, including other agreements to which it refers.

In the case of Hamburg Mining Co. *vs.* Stephenson (Nev.), 30 Pac., 1088, the second paragraph of the syllabus contains the following language:

"On the trial of the case the testimony of several witnesses was given with reference to a map of the premises in controversy, which testimony in the absence of such map, was indefinite and unintelligible. Such map was not included in the statement on appeal. *Held*, that all doubts arising on that account must be resolved in favor of the judgment." (See also Larson *vs.* Northern Pacific R. Co. (Minn.), 21 N. W. 836.)

III.

Under the fourth general division of the argument of counsel for defendant it is again asserted that Wilson was a fellow-servant of Pratt, Fallaha, and Tuck Watters, and that the bridge was not a "place" within the rule requiring the master to furnish a safe place. In support of these points are cited three cases. The first is that of B. & O. Railway Co. *vs.* Baugh, 149 U. S., 380. There the fireman and engineer were running an engine, and through the negligence of the engineer the injury occurred. The single question presented was whether the engineer and fireman were fellow-servants, and it was correctly held that they were. The distinction between that case and the one at bar is too apparent to need further comment. In addition to requiring that the

master furnish its employees a safe place to work, the Baugh case also fully recognizes and declares the doctrine that where there are separate departments in the business, the superintendent of a department is a vice-principal. The proposition is stated in this language:

"So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. *And it is only carrying the same principle a little further and with reasonable application* when it is held that, if the business of the master and employer become so vast and diversified that it naturally separates itself into departments of service, the individual placed by him in charge of these separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. * * * So, oftentimes, there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is, as to it, in the place of the master."

Another case cited by counsel is that of N. P. Railway Co. *vs.* Hambly, 154 U. S., 349. The court in that case specifically recognizes the fact that the co-servant rule would not apply if one having supervisory powers as a superintendent of the department were present exercising authority.

The next case cited by counsel is that of Railway Company *vs.* Peterson, *supra*. Here again the court clearly states the rule that where a superintendent is in charge of a distinct

branch of a business he acts as a representative of the master. The point is covered in this language:

"The rule is that, in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be 'the one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one and not subject to any great embarrassment in determining the fact in any particular case."

But, in the case at bar, both the trial court and the court below held, and correctly so, that defendant failed to effectively deny that Pratt was its general superintendent of construction, and was therefore not entitled to show that he occupied a different relation to plaintiff. Under this holding he and plaintiff certainly cannot be classed as fellow-servants.

Under part 2 of this heading defendant's counsel insist that the building and repair of the bridge in question was part of the "common undertaking," hence that there was no liability on the master to provide a safe place. A number of cases are cited on this point and we now review most of them. The first case so cited is that of Thayer *vs.* Smoky Hollow Coal Co., 121 Ia., 121; 96 N. W., 718. Here plaintiff was an employee of a mining company. Slate was falling from the roof of the mine. On page 719 the court states the rule that, if plaintiff was making a place for himself and was solely responsible for its creation, condition and repair, then the duty of the master to furnish a safe place would not obtain.

Another case here cited is that of Culver *vs.* South Haven & E. Co., 138 Mich., 443; 101 N. W., 663. Plaintiff therein was a brakeman for a railway company and, in attempting to couple the cars, was injured by a bolt projecting up through the track. The case simply states the rule that there is no absolute duty on the part of the railway to keep

its road-bed in repair, but that it need exercise only reasonable care in its efforts to do so.

The case of Baltimore & O. Ry. Co. *vs.* Hunsucker, 33 Ind. App., 27; 70 N. E., 556, is also cited hereunder. In that case plaintiff was a section man engaged in helping to remove wrecks. In lifting a large piece of iron it caught on the car and he was injured. The case is not applicable to any question involved in the case at bar.

Kellogg *vs.* Denver City Tramway Co., 18 Colo. App., 475; 72 Pac., 605, is also cited. Plaintiff was a pole lineman for the defendant company and in the habit of changing wires on decayed poles and resetting same. Without examination of the pole and on the statement of the foreman that it had been tried the day before, plaintiff climbed the same and it fell, injuring him. The court denies the application of the rule of "safe place," but emphasizes the facts that a whole carload of tools, hooks, and appliances was at hand, and that it was the manifest duty of plaintiff to make use of same, and that where a servant is employed to put a thing or place in a safe condition for use it would be inconsistent to require the master to have such place or thing in a safe condition beforehand.

Greely *vs.* Foster, 32 Colo., 292; 75 Pac., 351, is also here cited. A day laborer was injured in working in a trench. He was requested by the foreman to enter same and adjust the braces to prevent its caving in. The opinion of the court at page 352 shows that the plaintiff had been working at the job a month and was entirely familiar with the nature of the employment, and with the nature of the soil, and with the fact that the trench was caving in and breaking continually, and then says:

"In short, he had in all respects as much knowledge of the nature and character of the work and the dangers incident thereto as the foreman himself. * * * He was working at the place and necessarily saw its condition. * * * It is clearly established that he went into the place for the express purpose of making it a safe place."

On page 353 the court expressly distinguishes the case from that class where, as in an emergency, the servant was suddenly called upon to do work which was dangerous because of some hidden or latent defect. The rule imposing a duty on the master to provide a safe place is denied application in the case cited, but on this point the court, at page 354, clearly explains and emphasizes the distinction as follows:

"But here, where the plaintiff was making his own place to work in, the rule is clearly inapplicable. In 2 Bailey's Personal Injuries Relating to Master and Servant, in chapter 15, section 2934, the author refers to the distinction made between cases where employees are of the crew who are making the trench, and where, after it is made, an employee is set to work to perform labor of a different character *in the trench which has thus been prepared* as a place for the work. The master is not under obligations to make reasonably safe the trench for those employees who are actually engaged in making it, but his duty is to have the trench made reasonably safe for the second class of employees, who are to perform *work of a different character in the trench after it is made.*"

Another case cited by plaintiff in error is that of Kansas Coal Co. *vs.* Chandler, 71 Ark., 518; 77 S. W., 912. Here plaintiff was injured by the falling of a piece of stone from the roof of a coal mine in which he was employed. It was the duty of the company to furnish props. Plaintiff had asked for same and had been told to go ahead, that the props would be sent to him in good time.

On page 914 the conduct of the plaintiff in going ahead with the work under the advice of the foreman is sustained, and the court states that if that were the only question before it, judgment for plaintiff would be affirmed.

The Supreme Court reversed the case because the court below failed to "call attention to the *particular circumstances* of this case." The court refuses to impose the duty of providing a "safe place" on the defendant, but says: "In this

case, the evidence shows it was the duty of the servant to make the room safe by the use of timbers which the master was to furnish;" and, further, that "plaintiff was injured in the room where he and his partners alone worked and where they extended the room by digging into the walls thereof. They were, as a part of their duty both to themselves and their employer, to see that the roof was kept properly supported."

Another case cited by plaintiff in error is that of Kansas City Railway Co. *vs.* Billingsley, 116 Fed., 335. Here an injury occurred to a brakeman working in a railway yard. The rule is stated that a switchman, knowing the yards to be defective, assumes the risk if he continues in employment about same, and had no right to rely on the statement of the foreman that same were safe *where he had equal opportunity to see and know the facts.*

The court, at the foot of page 340 and again on page 342, lays emphasis on the point that the defects were patent; that the plaintiff had equal opportunity in broad daylight to know whether the obstructions had been removed or not.

From this brief review of the cases cited by defendant's counsel, it is evident they do not support the proposition that the act of the engineer and fireman in running a train across a bridge is so related to the principal work of repairing the bridge as to make it a "common undertaking," so as to avoid the rule requiring the master to furnish a safe place on which to run such engine. The two lines of work—running an engine and repairing bridges—are absolutely distinct.

In each of the cases above cited the court grounds its opinion on the fact that plaintiff had a personal part in the work of repair; his knowledge of the defects, and his specific duty toward the dangerous property.

In the case at bar plaintiff attempted to pass over the bridge *after the repair had been completed*, and this brings

him squarely within the distinction so clearly stated in Greely *vs.* Foster, *supra*, at page 354.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the court below should be affirmed.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
JOHN H. WRIGHT,
Counsel for Defendant in Error.

McCABE & STEEN CONSTRUCTION COMPANY v. WILSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 155. Argued March 5, 6, 1908.—Decided April 6, 1908.

Defendant who introduces testimony after the demurrer to plaintiff's evidence has been overruled waives any error to the ruling.

Where the cause of action is against the members of a copartnership who afterwards incorporate their business, themselves taking practically all the stock and continuing without changing their relations with employés, the fact that the suit is commenced against the corporation was held under the circumstances of this case, and in view of the fact that no testimony was offered, to be within the provisions of the Oklahoma statute, 146, art. 8, c. 66, Wilson's Ann. Stat., requiring the court to disregard, and not reverse for, defects of pleading or proceedings not affecting the substantial rights of the parties.

Where several instructions are asked and refused, exceptions must be taken separately and not as an entirety.

One employed as a fireman on an engine of a construction train *held*, under the circumstances of this case, not to be the fellow-servant of the foreman of the gang constructing the bridge which fell and caused the accident.

It is the duty of the employer to provide a suitable and safe place for the employés to work and they are not charged with any responsibility in regard thereto, and while the employer is relieved if he does everything that prudence requires in that respect, it is largely a question of fact and this court will not, in the absence of convincing testimony, set aside the verdict of a jury approved as was the verdict in this case by the trial and Supreme courts of the Territory, especially where the accident was the result of recurring conditions.

A fireman, who, under the circumstances of this case, remains at his regular post where his ordinary duty calls him, is not guilty of contributory negligence because he does not avail himself of permission to occupy a different and, perhaps, safer place.

17 Oklahoma, 355, affirmed.

On June 9, 1902, Wilson, the defendant in error, was injured by the giving way of a railroad bridge across the Canadian River in the Territory of Oklahoma. The bridge was on a new line of railroad, which was being constructed from Ok-

lahoma City to Quanah, Texas. The petition, filed October 18, 1902, in the District Court of the Third Judicial District, sitting in and for the county of Oklahoma, charged that the defendant, now plaintiff in error, was a subcontractor and constructing a portion of the railroad, including therein the crossing of the Canadian River; that Wilson was a locomotive fireman employed by the defendant. The circumstances of the injury were stated in the petition and negligence on the part of the defendant was averred. A trial resulted in a verdict and judgment in favor of the plaintiff for $5,500. This judgment was affirmed by the Supreme Court of the Territory (17 Oklahoma, 355), and thence brought here by writ of error.

Mr. Arthur G. Moseley, with whom *Mr. Louis B. Eppstein* was on the brief, for plaintiff in error.

Mr. James R. Keaton, with whom *Mr. John W. Shartel*, *Mr. Frank Wells* and *Mr. John H. Wright* were on the brief, for defendant in error.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

When the plaintiff rested the court overruled a demurrer to the evidence. This ruling, however, cannot avail the defendant, whatever the defects then in the case, for thereafter it proceeded to introduce testimony in its own behalf, and this waived any supposed error. *Accident Insurance Company* v. *Crandal*, 120 U. S. 529, 530; *Robertson* v. *Perkins*, 129 U. S. 233, 236; *Bogk* v. *Gassert*, 149 U. S. 17, 23; *Campbell* v. *Haverhill*, 155 U. S. 610.

The petition averred that one Pratt was defendant's superintendent of construction and one Fallahey foreman of the gang engaged in work on the bridge, and that the plaintiff was employed by the defendant through its general superintendent. The answer, in addition to certain special defenses, was

an unverified general denial, and the court held that under the pleadings the defendant was estopped from showing that the foreman of the bridge gang and the superintendent of construction were not in its employ. This ruling was based upon par. 3986 of the Oklahoma General Statutes of 1893, c. 66, § 108, which provides that "in all actions allegations . . . of any appointment or authority . . . shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Defendant also sought to prove that plaintiff was not in its employ; that it in fact did not exist at the time of the accident; that the contract for the construction work was taken by a partnership, McCabe & Steen. The answer of defendant alleged that the injury to plaintiff "was due to one of the risks assumed by the plaintiff in his contract of employment with this defendant."

The general denial in the answer as originally filed was in terms of "the allegations contained in the petition in manner and form as therein set forth." During the progress of the trial the defendant asked leave to amend by striking out the words "in manner and form as therein set forth," to which application the plaintiff objected, saying:

"As far as the general denial being sufficient to permit the defendant, admitting that it is the proper defendant, to raise further issues as far as it not being guilty of any negligence, admitting that it was the defendant and was doing the contracting work there, why we don't care anything about it; but we do object to their being permitted to amend their answer in any way so as to raise the issue that this defendant is not the defendant with whom the plaintiff contracted and who was doing this work."

The court thereupon announced its decision to neither permit nor deny the defendant leave to amend at that time, saying:

"The COURT: We will go ahead now and treat this answer as a general denial at this time, and will reserve my ruling on your motion until I see further; I will fix the terms later."

Thereafter the question came up again, and the record shows these facts:

"The COURT: The defendant will be permitted to amend the general denial by striking out those words (the words heretofore referred to) by the payment of half of the costs of court to this date, except the witnesses of the plaintiff—the fees; that is, provided, however, that if a continuance by reason of this amendment is taken by the plaintiff, the defendant shall be taxed with all the costs, unless the court should continue it on account of some showing made by the plaintiff, then of course the costs occasioned by the amendment would follow.

"Mr. KEATON: Counsel for plaintiff here states that if it is permitted to show by testimony that the McCabe & Steen Construction Company were not building this road and not building the bridge, then the plaintiff will have to make a showing and ask for a continuance of the case in order to reform the pleadings.

"Mr. MOSELEY: Well, we have not offered that testimony yet.

"The COURT: You gentlemen have heard my statement that if a continuance should be made necessary, then all the costs will follow.

"Whereupon the defendant amends its answer by striking out certain words, the same being 'in manner and form as therein set forth,' which appeared between the word 'petition' and the word 'and' in the third line of first paragraph of said answer."

It will be observed that counsel for the plaintiff stated that he had not yet offered testimony to show that the McCabe & Steen Construction Company was not building the road and the bridge, and the record shows that thereafter there was no testimony in any form offered to establish that fact. Now whatever might have been competent testimony under the answer as amended, it appears by the statement of counsel that no testimony respecting the matter had been offered, and the record shows that none was thereafter offered. It must

be stated, however, that prior to the ruling just quoted it had been shown that within six weeks after the injury, and while the work of construction was still in progress, the partnership conveyed all its interest to the corporation, the two members of the partnership of McCabe & Steen taking 96 per cent of the corporate stock. This transfer was of so little significance that it was unknown to its counsel at the time he filed the answer, and from his statement he evidently did not care to press any defense on that ground. The Oklahoma statute provides: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Section 146, art. 8, c. 66, Wilson's Ann. Stat.

With reference to these several matters thus grouped together we are of opinion that the Oklahoma statute we have just quoted sufficiently answers any claim of error. The litigation proceeded upon the theory that the corporation was the real party in interest, and while the partnership and the corporation were not identical, yet the partners were substantially the corporation, and the change in organization did not materially affect the rights of the plaintiff. Evidently, for business convenience, the partners concluded to organize as a corporation, and yet they took the bulk of the stock in their own names. They were practically the owners, and it does not appear that there was any change in the manner of doing business or in the relations of the employer to the employés. To hold, especially after this admission of counsel and his failure to offer any further testimony on the subject, that the substantial rights of the plaintiff were affected by any of these matters would be sacrificing substance to form. The objections were properly disregarded by the Oklahoma courts, both trial and supreme.

While the defendant asked several instructions the exception taken was not to the ruling on each instruction separately, but to them as an entirety. This plainly was insufficient.

Fullenwider v. *Ewing*, 25 Kansas, 69; *Bailey* v. *Dodge*, 28 Kansas, 72; *Fleming* v. *Latham*, 48 Kansas, 773.

There remain for consideration these matters: one, the contention that the plaintiff was a fellow-servant with the foreman of the gang at work on the bridge and the superintendent of construction; another, the question of negligence on the part of the defendant; and a third, contributory negligence. With reference to the first, it must be borne in mind that the plaintiff was a fireman employed on a locomotive, and his work was in a separate department from that of the employés engaged in the construction of the bridge. This is not a case for the application of the doctrine of fellow-servant. It would be carrying that doctrine too far to hold that one employed as a fireman and engaged in the movement of a train was a fellow-servant with the superintendent of construction and the foreman of a bridge gang, both of whom were present and engaged in supervising and directing the work on the bridge. These latter employés represented the principal in an entirely different line of employment from that in which the plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employés were to do their work—*Union Pacific Railway Co.* v. *O'Brien*, 161 U. S. 451, and cases cited in the opinion—and in discharging that positive duty they and not he were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant.

With reference to the second question, that of negligence on the part of the defendant, it must be premised that this is largely a question of fact, and a question of fact is submitted to the decision of a jury. Notwithstanding the able argument of counsel for defendant in endeavoring to show that the defendant did everything that prudence required for the purpose of making the bridge safe, we are not satisfied that the testimony is so convincing in this respect as to justify us in setting aside the verdict of the jury, approved as it was by the trial

and Supreme Courts of Oklahoma. There is, of course, resting upon the employer the duty of providing a suitable and safe place and structures in and upon which its employés are called to do their work, and this plaintiff was charged with no duty in respect thereto.

A full statement of the testimony would unnecessarily prolong this opinion, and a brief outline must suffice. The bridge was a pile bridge, the piles having been, as claimed, driven down to solid rock. This rock substratum sloped from the north to the south side of the river, the first bent striking the rock at eight or ten feet. At the place where the bridge sank the depth to the rock was eighteen feet. Above the rock was quicksand, and the piles were driven through it. The bridge was originally constructed some weeks before, but during high water a portion of it had washed out. It was rebuilt upon the same plan and with apparently no further protection than when originally constructed. At the time of the injury there was again high water, and that high water made a roaring torrent of the flowing stream. When the train upon which the plaintiff was fireman came to the river it was found that upon the bridge there had been placed a loaded flat car. Disengaging itself from the balance of the train, the locomotive moved on to the bridge and pulled that car off. As it did so there was a slight subsidence at the place where the bridge finally gave way. So the engine returned to the north bank of the river, while the gang of employés, under the direction of the foreman and the superintendent of construction, proceeded to place a false span underneath the bridge at the point of subsidence, and after awhile notified the train employés that the bridge was safe. Thereupon the engine moved slowly on to the bridge, and when it got to the place where there had been a prior subsidence the bridge sank so as to drop the engine into the river, and in that way the plaintiff was injured. Now it appears that by actual experience the bridge as originally constructed gave way in time of high water, and yet was rebuilt, without change of plan and without adding

further protection. When the high water returned, as it did at the time of the injury, there was again a giving way of the bridge. From this general outline of the case (filled, of course, more in detail by the testimony as to the circumstances of the work and the injury) it is apparent that there was a question whether the defendant had made suitable provision for securing a safe structure upon which the trains should pass; and upon a review of all the testimony we do not feel that we are justified in disturbing the verdict, approved as it was by the Oklahoma courts.

Thirdly, it is insisted that the plaintiff was guilty of contributory negligence, in that when the engine moved on to the bridge, at the time of the injury, the engineer said to him that he need not stay on the engine, but might go back on the train. But his place of work was in the engine, the same as that of the engineer, and because he did not avail himself of the suggestion and leave that place it can hardly be said that he was guilty of contributory negligence. He stayed at his regular place of work and where his ordinary duty called him to be, and it would be a harsh rule to hold that a man so doing was guilty of contributory negligence, because he did not avail himself of a permission to occupy a different and perhaps a safer place; especially as both the engineer and himself were advised by the construction force that the bridge was safe.

These are all the matters that call for notice. We find no error in the rulings of the Supreme Court of Oklahoma, and its judgment is

Affirmed.